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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-564

PAUL RICHARD, a/k/a RICHARD ANTHONY HARRIS,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. .

PAUL RICHARD, A/K/A RICHARD ANTHONY HARRIS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The Petitioner, Paul Richard, a/k/a Richard Anthony Harris, prays that a writ of certiorari issue to review the order of the Supreme Court of the Commonwealth of Pennsylvania rendered in these proceedings on July 14, 1975.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Cumberland County, Pennsylvania appears at Appendix II, *infra*, pp. A22-A36. The majority, concurring, and dissenting opinions of the Superior Court of Pennsylvania appear at Appendix I, *infra*, pp. A1-A21 and are reported at 336 A. 2d 423. The Supreme Court of Pennsylvania denied the Petitioner's Petition for Allocatur without opinion in a per curiam order entered on July 14, 1975. In response to a directive to report for commitment under his sentence of imprisonment, Petitioner's attorneys filed an Application for a Writ of Habeas Corpus on August 8,

1975, with the United States District Court for the Middle District of Pennsylvania. The opinion of the District Court, issued on September 16, 1975, is presently unreported and appears at Appendix III, *infra*, pp. A37-A57.

JURISDICTION.

The order of the Supreme Court of Pennsylvania was entered on July 14, 1975. The jurisdiction of this Court is involved under 28 U. S. C. 1257(3).

QUESTION PRESENTED.

Does this Court's holding in *Wong Sun v. United States*, 371 U. S. 471 (1963) as applied in *Brown v. Illinois*, No. 73-6650 (decided June 26, 1975), render inadmissible contraband seized during the search of a vehicle, which search was conducted pursuant to a written consent obtained from the operator of the vehicle within nine to ten minutes after an illegal warrantless arrest, which arrest was accomplished by the use of deadly force along the Pennsylvania Turnpike, where *Miranda* warnings were given by the arresting officers prior to their obtaining the written consent?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATEMENT.

On November 16, 1972, your Petitioner was a passenger in a International Travel-All van, which was traveling east on the Pennsylvania Turnpike, which van was owned and operated by Santos and was registered in California. At approximately 1:30 P. M. the State Police communications center at Highspire, Pennsylvania, broadcast a radio message which described Petitioner's vehicle, and stated that it "was believed that the vehicle was carrying a large quantity of marijuana".

State Trooper Max Seiler, in a patrol car, sighted Santos' vehicle shortly after he had received the radio message. Trooper Seiler indicated that he observed nothing suspicious, nor any motor vehicle violation of any kind, and then radioed for assistance and followed the van until Trooper Robert Geary appeared on the scene in another patrol car. With one patrol car in front of the van, and one patrol car at the rear, the troopers signaled Santos to stop. The officers emerged from their cars armed with a .30 caliber semi-automatic carbine and a 12 gauge pump shotgun. Petitioner and Santos were ordered to spread eagle while Trooper Geary covered them with his carbine. After a patdown search indicated that the suspects were unarmed, the troopers returned their rifle and shotgun to their cars while retaining their hand weapons in their holsters.

Trooper Seiler then conducted a radio check on the operator, Santos', driver's license and owner's card, while Trooper Geary read the *Miranda* warnings from a standard police form. Both Santos and Richard stated that they understood their rights. Trooper Geary stated that he wanted written permission to search the International Travel-All for their protection (the police protection) in

the event anything was missing after a search would take place. Santos gave permission, and when informed of the reason for signing the paper, Santos signed the paper, as did Richard, who had no conversation with the trooper whatsoever during the entire period of time at the van. Trooper Seiler rejoined the group after his license check proved negative and he then administered the *Miranda* warnings a second time. Santos asked why he had been stopped. Both Santos and Richard were told by the trooper that the trooper had reasonable cause to believe that his vehicle contained a large amount of marijuana. At the suppression hearing, Santos testified that the troopers next told him that there were two ways they could search the van; they could either present their reasonable cause to a District Justice, and if the District Justice was satisfied, a warrant to search the van would be issued, or Petitioner and his companion could give the troopers permission to search the vehicle. Santos then gave his verbal permission for a search. Your Petitioner said nothing. The troopers then requested that a paper be signed before the search. Petitioner, Richard, and Santos were both told that the paper was to protect the troopers from recourse "if something would be stolen or anything of that nature". The troopers stated that if the paper were not signed, they would hold the Petitioner and his companion until the investigation was completed. At trial, this paper was considered to be a written consent, given by Petitioner and his companion, to search the van. Petitioner, Richard, never orally consented to a search of the van or anything else. He merely signed the paper in acquiescence to the statement made by the trooper that the reason for signing the paper was for the protection of the troopers as outlined above. There was no indication that Petitioner, Richard, had any right to grant permission to search the vehicle,

since it was not registered in his name, nor was he the operator, nor had he in any way indicated any ownership or control of the vehicle and its contents. Santos then consented to a search. Richard, however, did not consent, nor did he say anything. Thereafter, Santos opened two combination locked suitcases, which the troopers had discovered inside the van. Prior to opening the suitcases, Santos remarked "Here's where you make Sergeant". These suitcases were found to contain a quantity of controlled substance, later determined to be marijuana. Petitioner and Santos were handcuffed and taken to a local State Police barracks. The paper signed by Richard and Santos was written by the troopers and not by the Defendants. During the entire situation the conversation was carried on by Santos and Richard said little or nothing, but stood there during the course of the conversation.

Critical circumstances of the present case include the following facts. Only nine or ten minutes elapsed between the moment Officer Seiler first saw the vehicle and the point at which the alleged written consent to search the vehicle was obtained. This time was taken directly from the testimony of the officer, who had logged the time on various documents being kept by the police officers. The stopping of the vehicle, the spread-eagle search at gun point, the return of the Officer's weapons to their cars, the reading of *Miranda* rights, the driver's license check, the back and forth questioning which preceded the signing of the consent to search, and the signing of the instrument itself, including the contact to headquarters and the arrival of the second vehicle on the scene, all occurred within the space of nine or ten minutes. Further, no evidence was introduced throughout the entire proceedings which tended to establish probable cause for radio broadcast which triggered the arrest and consequent search. No evidence was produced

at either the suppression hearing or at trial which in any way indicated the source of the information upon which the police broadcast was made, nor was evidence introduced as to the particular nature of the information that led the police to conclude that Santos' vehicle was carrying a large quantity of marijuana. Finally, there was no evidence whatsoever of a motor vehicle violation or of any unusual operation of the van by Santos prior to the arrest.

At the barracks, Santos and Richard refused to sign waiver forms, and instead indicated that they did wish to consult with an attorney and crossed out the section indicating that they were willing to answer questions, indicating an unwillingness to answer any questions at that time or at any time thereafter. After leaving the barracks on the way to the District Magistrate's Office, the troopers engaged in conversation and attempted what they call "*informal, inquisitive type conversation . . . to gain information*". This was subsequent to the very absolute determination of Santos and Richard not to answer questions. The troopers indicated that this was a subtle method of getting around such refusals to sign the waivers. It was alleged that an incriminating statement was made during that time by Richard, although the officer originally testified that the statement was made by "someone in the backseat", both Santos and Richard being in the backseat.

On February 8, 1973, a suppression hearing was held and on February 26, 1973, a timely motion by Petitioner for suppression of evidence was overruled and dismissed. On February 27, 1973, Petitioner waived his right to a jury trial and on February 28, 1973, Petitioner appeared for trial before the Honorable Clinton R. Weidner in the Court of Common Pleas of Cumberland County, Pennsylvania. A verdict was issued on May 21, 1973, in which Petitioner was held guilty on a single count of unlawful

possession with intent to deliver a Schedule I controlled substance in violation of Section 13(a)(3) of Pennsylvania's Controlled Substance, Drug Device and Cosmetic Act of 1972, No. 64, P. L. —, 35 P. S. 780.113(a)(3). The question of whether the marijuana seized during the search of Santos' van was admissible into evidence under the Fourth Amendment of the United States Constitution was raised prior to trial by Petitioner in his brief in support of his motion to suppress evidence. The constitutional question was reiterated by Petitioner in his motions for a new trial and in arrest of judgment. On January 10, 1974, the trial court issued an opinion holding that the evidence was properly admitted. Appendix II, *infra*, pp. A22-A36. On April 16, 1974, Petitioner was sentenced to a term of imprisonment of not less than two nor more than five years.

Upon appeal, the Pennsylvania Superior Court held that Petitioner was arrested when he was forced to undergo the gunpoint patdown search outside his van and that such arrest was illegal because unsupported by probable cause, citing *Whiteley v. Warden*, 401 U. S. 560 (1971). The Court assumed arguendo that the officers were similarly not entitled to stop Santos' vehicle, citing Justice Black's dissenting opinion in *Whiteley, supra*. Nonetheless, the Court concluded that the marijuana was admissible because Petitioner's consent to search was voluntarily given and such consent was sufficient to dissipate any taint resulting from the illegal arrest.

On April 30, 1975, Petitioner's attorney filed a Petition for Allocatur with the Supreme Court of Pennsylvania alleging that the Superior Court's decision failed to give sufficient consideration to state and federal cases holding that the fact that a confession, consent or incriminating statement was voluntarily given may not be enough to overcome the taint resulting from unconstitutional arrest

or seizure. The Petition indicated the likelihood that your Honorable Court's decision in *Brown v. Illinois*, No. 73-6650 (decided on June 26, 1975), then pending before your Honorable Court, would have a major impact upon the resolution of the question of the present case. On July 14, 1975, the Supreme Court of Pennsylvania entered a per curiam order denying the Petition for Allocatur.

In response to an order issued by the Office of the District Attorney of Cumberland County, Pennsylvania, directing Petitioner to appear for commitment under his sentence for imprisonment, Petitioner's attorneys filed an Application for a Writ of Habeas Corpus with the United States District Court for the Middle District of Pennsylvania on August 8, 1975. Before the District Court, Petitioner argued that the facts and rationale of *Brown, supra*, required suppression of the marijuana seized during the search of Santos' van. The District Court affirmed the decision of the Pennsylvania Superior Court. Appendix III, *infra*, pp. A37-A57. In doing so, it completely failed to make any comparison between the facts of *Brown, supra*, and the facts of the present case.

REASONS FOR GRANTING THE WRIT.

A. The Decisions Below Fail to Apply the Ruling Enunciated by This Court in Brown v. Illinois, No. 73-6650 (Decided June 26, 1975).

In *Brown v. Illinois*, No. 73-6650 (decided on June 26, 1975) this Court held it error to adopt a per se rule that the *Miranda* warnings in and of themselves serve to break the causal connection between an illegal arrest and a subsequently obtained confession, consent, or statement. This Court then defined the standard to be used in determining the admissibility of statements induced by the effects of unconstitutional custody under the Fourth Amendment. While none of the lower Courts' opinions in the present case have adopted the type of per se rule condemned by *Brown, supra,* it is Petitioner's contention that the lower Courts failed to correctly apply the test announced in *Brown* for determining the admissibility of statements made while in unconstitutional custody.

The facts of *Brown* relevant to the present case may be briefly summarized as follows. Three police officers went to Brown's apartment at approximately 5:00 P. M. While one officer covered the front downstairs entrance to the apartment, the other two officers broke into the apartment and searched it. The police were investigating a murder which had occurred a week earlier. One of the officers had obtained Brown's name from the decedent's brother, who identified Brown as an acquaintance of the victim, and not a suspect. As Brown climbed the stairs leading to the rear entrance to his apartment, he glanced at a window and saw a revolver pointed at him which was held by a stranger inside his apartment. Brown was told not to move and that he was under arrest. Brown was

then searched at gunpoint. No weapon was found. Brown was then asked his name. When he denied being Richard Brown, the officers showed him an identifying photograph which had been given to them by the decedent's brother; the officers informed Brown that he was under arrest for murder, handcuffed him, and escorted him to the squad car.

During the twenty minute drive to the station house, the police unsuccessfully questioned Brown about his true name. Upon arrival at the station house, Brown was initially left alone in the interrogation room while the officers obtained the homicide file. When the officers returned, Brown was given his *Miranda* rights. The officers then told Brown that they knew of an incident in which Brown fired a shot from a revolver into the ceiling of a poolroom and that a bullet taken from the ceiling of the poolroom would be compared with the bullets taken from the murder victim's body. At this point, approximately one hour had elapsed since Brown's arrest. An officer then asked Brown whether he wanted to talk about the homicide. Brown said that he did and for the next twenty minutes the police typed out a series of questions and answers in which Brown admitted participating in the murder.

At trial, Brown was found guilty of murder. The Supreme Court of Illinois found Brown's warrantless arrest was unlawful because not supported by probable cause but the Court concluded that the giving of *Miranda* warnings served to break the causal connection between the illegal arrest and Brown's statements, and that Brown's act in making the statements was sufficiently an act of free will to purge the primary taint of the unlawful invasion.

Upon appeal, this Court noted:

> "Although almost 90 years ago, the Court observed that the Fifth Amendment is in 'intimate rela-

tion' with the Fourth, *Boyd v. United States,* 116 U. S. 616, 633 (1886), the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce, since the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. Ibid.; see *Mapp v. Ohio,* 367 U. S. at 646 n. 5. The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation (Footnote: the *Miranda* warnings in no way inform a person of his Fourth Amendment rights, including his right to be released from unlawful custody following an arrest made without a warrant or lacking probable cause).

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement

> meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' 371 U. S. at 486. *Wong Sun* thus mandated consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."

For the purpose of determining whether a voluntary confession or consent to search obtained as a result of a Fourth Amendment violation is admissible, this Court announced the following test:

> "The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly, the purpose of flagrancy of official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution."

Applying the foregoing test to the facts of Brown's case, Justice Blackmun in delivering the majority opinion of this Court, expressly stated: "We could hold Brown's first statement admissible only if we overrule *Wong Sun*. We decline to do so."

The facts of the immediate case present even stronger arguments for suppression of the evidence seized pursuant to the illegal arrest than did *Brown, supra.* Both *Brown* and the present case involve constitutionally impermissible arrests of a similar nature. In both cases the warrantless arrest was determined to be illegal because unsupported by probable cause (Appendix I, *infra*, p. A4). In both cases the arrest was accomplished by the use of deadly force in an isolated environment. However, in the present case the temporal proximity between the illegal arrest and the subsequently obtained statement was much shorter than that in *Brown.* In *Brown* approximately one hour had elapsed between his illegal arrest and his subsequent confession. In the present case a spread eagle search was conducted at gunpoint before any conversation occurred. The consent to search was obtained within the space of nine or ten minutes afterward, almost simultaneously with the illegal arrest. In this regard reference should be made to the concurring opinion of Justice Powell in *Brown:* "Thus, with the exception of statements given in the immediate circumstances of an illegal arrest—a constraint I think is imposed by existing exclusionary rule law—I would not require more than proof that effective *Miranda* warnings were given and that the ensuing statement was voluntary in the Fifth Amendment sense." Under the facts of the present case, Petitioner clearly comes within the protection of the foregoing rule. In truth, it is a practical impossibility for any conscientious explanation or warning to have been given to these Defendants, which would have freed them from the frenzy of the event that was occurring at that moment. The Court rejected in the *Wong Sun* case the government's assertion that Toy's statement resulted from an independent act of free will sufficient to purge the consequences of the illegal arrest. *Wong Sun, supra.*

It should also be noted that the *Miranda* warnings given in the present case do not constitute an intervening circumstance that dissipated the initial taint of the illegal arrest. This result follows from the holding of *Brown* itself. Brown's first statement was preceded by the *Miranda* warnings and was separated from his illegal arrest by an interval of over one hour. Yet this Court expressly held that it could hold Brown's first statement admissible only if it overruled its holding in *Wong Sun*, 371 U. S. 471 (1963), which this Court refused to do. The fact that *Miranda* warnings were given in the present case is thus not determinative on the Fourth Amendment issue.

An examination of the lower Court's opinions in the present case indicates that they failed to apply *Brown's* standards in determining the question of the present case. The decision of the Pennsylvania Superior Court properly determined the effect of *Miranda* warnings on the voluntariness of the consent to search given. However, having found a voluntary consent under the Fifth Amendment, the Court assumed that the Fourth Amendment's guaranty against unreasonable searches and seizures was satisfied. That the Court followed this process is indicated by the fact that the "taint" or "Fruit of the Poison Tree" question is disposed of in only twenty lines in the Court's opinion (Appendix I, *infra*, p. A7-A8). The opinion also cites *Commonwealth v. Bishop*, 425 Pa. 175 (1967) as authority for the proposition that the "taint" of the illegal arrest in the present case was dissipated by a sufficient act of free will. *Bishop, supra*, does not control the present situation since it deals with the admissibility of a confession obtained from a sixteen-year old during stationhouse questioning. The circumstances of *Bishop, supra*, are not similar to those of the present case. Furthermore, the opinion completely fails to consider the extremely short interval, nine

to ten minutes, that elapsed between the illegal arrest and the procurement of the written consent to search Petitioner's vehicle. Additionally, while the Court stated that the arrest was unconstitutional because unsupported by probable cause, and that the officers were not entitled to stop Santos' vehicle for investigatory purposes, the opinion fails to accord any weight to these circumstances in determining the Fourth Amendment question.

The decision of the District Court correctly observes that *Brown's* precise holding is that *Miranda* warnings alone and per se do not ensure that an act is sufficiently a product of free will to break the causal connection between the illegality of an arrest and a subsequent statement or confession. The Court's opinion, however, refuses to note the strong similarity between the facts of the present case and those of *Brown*. The opinion decides the question of the present case by reference to state and federal decisions entered prior to *Brown* and fails to accord the holding of *Brown* any weight in the determination of the Fourth Amendment question. At its conclusion, the opinion refers to the fact that Santos and Richard demanded to know why they had been stopped before they would acknowledge their *Miranda* warnings (Appendix III, *infra*, p. A53). The Court then cites this fact as evidence that Petitioner was not acting under the coercion of the troopers. To regard such an act as evidence of the exercise of free will, is highly unrealistic. Such a demand is likely to be made by anyone, whether intimidated or not, after the type of sudden and violent encounter with police officers as occurred in the present case.

Both lower Court opinions regard the facts that Santos participated in the search of his van and stated, "Here's where you make sergeant", prior to opening the suitcase which contained marijuana, as evidence that Santos was

not acting under coercion inherent in his unlawful arrest (Appendix I, *infra*, p. A7; Appendix III, *infra*, p. A50). Such an approach ignores the fact that the crucial moment for determining whether Santos was acting under coercion came at the time he signed the written consent to search the vehicle. Your Petitioner, Richard, never verbally gave consent, and signed only after he was told that the document was for the protection of the police officers and once Santos had signed the paper, a search of the van was inevitable, since the officers indicated they had possession of reasonable cause to present to a District Justice. Faced with this inevitability, Santos had no incentive to avoid incriminatory acts, and Richard was not involved in the entire transaction of the search at all. His only act was to sign the paper that the police officer indicated was for the protection of the police officer. The psychological pressures inherent in this situation dictated that Santos cooperate with the troopers in the hope of leniency, and insofar as your Petitioner, Richard, is concerned, he did not cooperate and did not indicate that he in any way was able to cooperate or even knew that there was anything improper in the van. Thus, to interpret the acts of Santos as evidence of an unrestrained act of free will is highly unrealistic, and in no way would be indicative of any act of free will of Defendant, Richard.

B. The Decisions Below Fail to Accord Proper Weight to the Flagrancy of the Police Misconduct Involved in the Present Case.

This Court's decision in *Brown v. Illinois*, No. 73-6650 (decided June 26, 1975) expressly requires that a reviewing court consider the purpose and flagrancy of police misconduct. This factor was not considered in the majority opinion of the Pennsylvania Superior Court in the present

case. The opinion begins by holding that the arrest was invalid because unsupported by probable cause (Appendix I, *infra*, p. A4), yet the opinion continued through to its conclusion without any taint to this circumstance. This is a serious omission since this Court in *Brown* attached great weight to the facts that Brown's warrantless arrest was unsupported by probable cause and that the arrest was made under circumstances that could be described as investigatory. This Court stated:

> "The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning'. The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion."

The foregoing consideration is directly applicable to the immediate case. No attempt was ever made by the Commonwealth at the suppression hearing or at trial to demonstrate the source of, or the reliability of, the information on which the radio broadcast was based. The dissenting opinion in the Pennsylvania Superior Court also stresses that the arresting officers did not view a motor vehicle code violation or anything suspicious about the appearance of Santos' vehicle (Appendix I, *infra*, p. A19). In fact, *under the record of the present case it remains a complete mystery through the present time as to how and why police attention focused on Petitioner in the first place.*

Consequently, the case presents even more aggravating circumstances on the question of the propriety of the police conduct than does *Brown*. In *Brown*, at the time of the arrest the police at least possessed information from the decedent's relatives linking the decedent with Brown. In the present case it has not been demonstrated that the arresting officers, or the officer in charge of the radio broadcast, possessed *any* reliable information indicating that Petitioner possessed narcotics. Since no attempt was made by the Commonwealth to establish probable cause for the present arrest, either at the suppression hearing or at trial, the conclusion is inescapable that valid probable cause never existed. Obviously, the officers authorizing the broadcast issued their radio message with the knowledge that an arrest would immediately occur and with the hope that the arrest "would turn something up." It is precisely because of this possibility that this Court in *Brown* refused to hold that the giving of the *Miranda* warnings always dissipates a Fourth Amendment taint. This Court stated:

> "Arrests made without warrant or without probable cause, for questioning or 'investigating' would be encouraged by the knowledge that evidence derived therefrom hopefully could be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words'."

Accordingly, since no basis was ever established for the police intrusion throughout the proceedings of the present case, the fact that the arresting officers happened to give the *Miranda* warnings should be discounted.

Furthermore, the manner in which the arrest was effectuated, in a manner "calculated to cause surprise, fright, and confusion" is clearly condemned by *Brown*. At this point it should be noted that the arresting officers apparently believed they were dealing with dangerous suspects. This belief apparently originated with the officer or officers who directed the broadcast be made knowing that an arrest involving the use of deadly force would be made. Until the present time it cannot be determined whether there was ever a basis for ordering such drastic action to be taken.

In the matter of your Petitioner, Richard, there is one vital point which differentiates his case substantially from that of Defendant, Santos'. This has to do also with the actions of the police officers. The custodial statements obtained from an accused subsequent to his indication in writing of his desire for assistance of counsel and the crossing out of the portion of the document that indicated his willingness to answer questions, is of vital significance to Defendant, Richard. In Richard's instance, there is no question that he desired an attorney and that he did not wish to answer questions, and that the police officers should not have attempted to use deceitful and circuitous methods of attempting to obtain information from him.

This is recognized in the majority opinion of Justice Cercone when he recognized that Santos' remark indicating knowledge and the evidence of Santos' involvement having been already overwhelmingly established by the fact that the vehicle was his, he had prepared for the illegal transportation, that he had implicit knowledge of the contents of the luggage, a statement allegedly made by Richard was not reversible error insofar as *Santos* was concerned. The Court recognized on Page 8 of its opinion that *Richard* was obviously damaged by the alleged ad-

mission of the words "it's mine". The Court points out very vividly that up to that point, the government's case against Richard was not strong and goes on to indicate *that if the Court determined that the remark "it's mine" was in response to an illegal inquiry of him, Richard is entitled to a new trial.* The Court in its quotation in *Commonwealth v. Simila,* 434 Pa. 219, 352 A. 2d 575 (1969) at Page 226 states:

> "It is not simply custody plus 'questioning', as such, which calls for the Miranda safeguards but custody plus police *conduct* . . . calculated to, expected to, or likely to, evoke admissions."

The police officers themselves through the entire case are quoted concerning "the informal, inquisitive type of basis for questioning", which in fact elicited statements from both of these Defendants, after a refusal to sign a waiver of rights, and an indication that both of the Defendants wanted counsel and did not want to answer questions. Instead of direct questioning, they wanted to keep the Defendants at ease and engaged in conversation type of questioning to gain information. This was a denial of the constitutional rights of Richard, and a response allegedly given by Richard during that informal, inquisitive type of questioning, that is held to be the vital point as far as Richard was concerned in not giving Richard a new trial.

In conclusion, the applicability of this Court's decision in *Whiteley v. Warden,* 410 U. S. 560 (1971) should be recognized. *Whiteley, supra,* involved a vehicle stop and arrest made by the police in response to a radio broadcast, a situation very similar to the present case. However, in *Whiteley* the police enjoyed the distinct advantage of the fact that a complaint had been sworn to before a magistrate and a warrant issued, which warrant served as the basis of

the radio broadcast. This Court held the resulting warrantless arrest unconstitutional because the evidence presented before the magistrate who issued the warrant did not amount to probable cause. The State unsuccessfully argued that less stringent standards should be employed in reviewing the police officer's assessment of probable cause in a situation involving a warrantless arrest, than should be employed in reviewing a magistrate's assessment before issuing an arrest or search warrant. This Court rejected the argument on the grounds that such rule would unwisely encourage officers to evade the warrant requirement of the Fourth Amendment.

Likewise, in the present case the circumstances that the arresting officers acted in good faith and properly administered the *Miranda* warnings after making the arrest should not be allowed to obscure the fact that neither they, nor their fellow officers issuing the radio broadcast, possessed a reasonable basis for the police intrusion. The taint attaching to an arrest made without any supporting basis under the Fourth Amendment should not be ignored because the arresting officers acted in good faith.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I.

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IN THE
SUPERIOR COURT OF PENNSYLVANIA.
PHILADELPHIA DISTRICT.

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No. 984 OCTOBER TERM, 1974.
No. 983 OCTOBER TERM, 1974.

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J. 1105

COMMONWEALTH OF PENNSYLVANIA

v.

PAUL RICHARD a/k/a RICHARD ANTHONY HARRIS
and THEODORE JAMES SANTOS, JR.,

No. 983—APPEAL OF THEODORE JAMES SANTOS, JR.
No. 984—APPEAL OF PAUL RICHARD A/K/A
RICHARD ANTHONY HARRIS.

—

APPEAL FROM THE JUDGMENTS OF SENTENCES IMPOSED APRIL 16, 1974, BY THE COURT OF COMMON PLEAS, CRIMINAL, OF CUMBERLAND COUNTY AT NO. 252 DECEMBER TERM, 1972.

OPINION BY CERCONE, *J.*: FILED MARCH 31, 1975.

This appeal arises from the lower court's entrance of judgments of sentence against Paul Richard and Theodore Santos after a non-jury trial. Appellants were found guilty

of unlawful possession with intent to deliver a Schedule I controlled substance; to wit, 225 pounds of marijuana. Appellants now argue, inter alia, that the lower court erred in refusing to suppress certain physical evidence and particular incriminating statements appellants made after their arrest and request for counsel.

The evidence in the instant case, cast in the light most favorable to the Commonwealth, is as follows: On November 16, 1972, State Trooper Max Seiler received a radio broadcast to the effect that a white International Travelall, California registration SZH992, with two white male occupants, had entered the Turnpike at Breezewood carrying a large quantity of marijuana. Trooper Seiler, who was in the vicinity, responded to the call and soon sighted the vehicle heading east. After calling for assistance, Trooper Seiler followed the van until Trooper Thomas Geary appeared on the scene. With one patrol car in front of the van and one patrol car in the rear, the troopers signalled the driver of the van, appellant Santos, to pull over. Each trooper emerged from his car armed, and instructed the occupants of the van to get out and "spreadeagle" against the van. After the "patdown" proved that the appellants were unarmed, the troopers returned their weapons to their cars.

While Trooper Seiler radioed that the appellants had been apprehended, and waited for information concerning the status of the vehicle registration and appellants' drivers' licenses, Trooper Geary gave the appellants their *Miranda* warnings and ascertained that they understood them. He then informed them that the police had reason to believe that they were transporting a large quantity of marijuana, and asked appellants if they would permit the troopers to search their van, advising them as follows:

> "I want you to keep this in mind, that if you give me permission and if we would find anything in the

vehicle it would be used against you—I want you to understand this . . . . You do not have to give me permission to search the vehicle."

When Trooper Seiler returned to the van (there were no irregularities in appellants' registration or licenses), he also gave appellants their *Miranda* warnings and ascertained that they understood them. He then advised appellants that in Pennsylvania they were not required to consent to the search and could demand that the police produce a warrant. Despite those warnings, Santos and Richard orally consented to the search. Troopers Seiler and Geary, however, were reluctant to search unless appellants consented in writing. Both Santos and Richard then signed a handwritten consent granting the troopers permission to search the van. Appellant Santos then went to the front seat of the van, removed a box from under the seat, and extracted a set of keys which he used to open the tailgate.

There was nothing suspicious about the inside of the van—it contained suitcases, clothing bags, a cooler, a mattress and blankets. Santos then said, "where would you like to start;" and, Trooper Seiler selected one of the suitcases. Santos thereupon opened the combination lock on the suitcase and began removing the clothing inside. Trooper Seiler noticed that among the piles of clothing there was a tightly rolled newspaper, and upon unrolling the newspaper, discovered a quantity of marijuana. Undaunted, Santos asked where the troopers would next like to look, and Seiler selected a second suitcase, whereupon Santos remarked, "Here's where you make sergeant." Santos undid the combination lock and opened the suitcase which was filled with marijuana packaged in large bundles. Appellants were then handcuffed and taken to the local State Police barracks. A subsequent search re-

vealed other large caches of marijuana, similarly packaged, including 49 kilos concealed in a compartment cut out of the floor of the van and recovered with the plywood flooring. In all, appellants had been transporting more than 225 pounds of the contraband.

At the suppression hearing appellant Santos corroborated the troopers' testimony that they had advised appellants of their rights, including their right to refuse to consent. Santos alleged, however, that the troopers had stated that if appellants did not consent, they would impound the van and get a search warrant. Both troopers disagreed that they had so phrased their advice and explained why they did not—they were aware that representations of the availability of a search warrant could be construed to be coercive and thereby vitiate the consent. The question, therefore, was one of credibility properly left for resolution by the hearing court below.

I.

It appears that under the rationale of *Whiteley v. Warden*, 401 U. S. 560 (1971), the state troopers did not have probable cause to arrest the appellants merely on the basis of the radio broadcast, nor does the Commonwealth so argue in the instant appeal. Assuming arguendo that troopers were similarly not entitled to stop the automobile,[1] we are left with two hurdles that the Commonwealth must surmount in order to justify the search of the van and the seizure of the marijuana: (1) Did the appellants voluntarily consent to the search; and (2) Did the illegal stopping or arrest of the appellants automatically render the marijuana inadmissible as "fruit of the poisonous tree."

Although the lower court determined that appellants were under arrest from the moment the officers ordered

1. *Whiteley v. Warden*, 401 U. S. at 573. (Dissenting Opinion by Justice Black.)

them to "spreadeagle," and that the arrest was illegal, this decision of the lower court did not dispose of the question of whether or not the appellants' consent to the search was involuntary. It is true that voluntariness of consent rests upon all the surrounding facts and circumstances, and great deference should be given to the decision of the hearing court since that court has had the opportunity to observe the appearance and demeanor of the witnesses and the defendants. As Justice Traynor stated in *People v. Michael*, 290 P. 2d 854 (Cal. 1955):

> "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in light of all the circumstances."

This rule was cited and quoted with approval in *Schneckloth v. Bustamonte*, 412 U. S. 218 (1973). C.f., *State v. King*, 209 A. 2d 110 (N. J. 1965); *Rosenthall v. Henderson*, 389 F. 2d 514 (6th Cir. 1968); *United States v. Page*, 302 F. 2d 81 (9th Cir. 1962).

However, in evaluating the voluntariness of consent, a variety of factors have achieved great significance in supporting the conclusion that consent is valid despite the fact of an illegal arrest. In *Armwood v. Pepersack*, 244 F. Supp. 469, 474 (D. Md. 1965), the court, after examining a variety of federal circuit court cases on the subject, stated:

> "Where the voluntary nature of the alleged consent is attacked, the court sees no reason to distinguish as a matter of law between the express or implied 'coercive' effect of an illegal arrest, a legal arrest or police action not amounting to arrest but under the color of authority."

The court then concluded that the circumstances surrounding the consent in that case clearly indicated that the consent was voluntarily given. See also *Alexander v. U. S.*, 390 F. 2d 101 (5th Cir. 1968); *Gibson v. U. S.*, 140 F. 2d 381 (D. C. Cir. 1945); *U. S. v. Burke*, 215 F. Supp. 508 (D. Mass. 1963), aff'd 328 F. 2d 399 (1st Cir. 1964), cert. denied 379 U. S. 849; *U. S. v. Busby*, 126 F. Supp. 845 (D. D. C. 1954); *People v. Nawrocki*, 148 N. W. 2d 211 (Mich. 1967).

Perhaps the most persuasive fact in concluding that a consent was voluntarily granted despite the coercive atmosphere of an arrest is the furnishing of advice to the consenter concerning his constitutional rights, especially his right to refuse to consent. Indeed, in the Third Circuit the provision of *Miranda* warnings alone, followed by a consent to search, is not only persuasive but controlling on the question of voluntariness. Thus, the court stated in *United States v. Menke*, 468 F. 2d 20, 24 (3d Cir. 1973):

> "In [Government of the Virgin Islands v. Berne, 412 F. 2d 1055 (3d Cir. 1969)], we held that where a defendant is given the detailed warnings mandated by Miranda v. Arizona . . . and thereafter 'voluntarily submits to interrogation and freely offers information on the existence and location of specifically identified evidence, and further agrees to surrender the evidence to police, fully cognizant of his right to remain silent and fully aware that the information he provides may be used against him, the seizure of such evidence does not violate the Fourth Amendment. In such a case, the accused, by his words and actions, has abandoned any privacy or security in the location of the evidence.'" [2]

2. See also *United States ex rel. Harris v. Hendricks*, 423 F. 2d 1096 (3d Cir. 1970); *United States v. De Larosa*, 450 F. 2d 1057 (3d Cir. 1971).

In the instant case, it is undisputed that the appellants were twice given *Miranda* warnings. It is also undisputed that they fully understood the substance of the rights of which they were apprised. The record also demonstrates that the appellants consented to the search after the troopers had advised them several times that they need not consent and could require the police to procure a warrant from a magistrate. The fact that appellants were in custody, and the fact that the troopers initially displayed their weapons,[3] are simply not sufficient to undermine this clear and convincing evidence of consent, principally because of the troopers' repeated explanations of appellants' constitutional rights under the Fourth, Fifth and Sixth Amendments, appellants' understanding of the warnings and Santos' active assistance in conducting the search. See generally Annotation, 9 A. L. R. 3d 858 (1966).

Turning to the question of whether the evidence obtained was fatally tainted as a result of the illegal arrest of appellants, we note at the outset that "de facto causation" is not the criterion for determining whether the evidence was obtained as a consequence of unlawful conduct by the authorities. As our Supreme Court stated in *Commonwealth v. Bishop*, 425 Pa. 175 at 182, n. 5 (1967): "Mere 'but-for' causation is not sufficient to establish the causative relationship necessary to taint the post-illegal arrest verbal evidence." Thus, "courts in a number of cases have applied or recognized that, while the 'fruit of the poisonous tree' doctrine requires the exclusion of all evidence obtained by exploitation of [that initial illegality], it does not bar evidence gained by means sufficiently distinguishable to be purged of the primary taint of such illegality." An-

3. The evidence indicates that after the troopers returned their weapons to their patrol cars the appellants were at ease and conversational. Santo's remark, "Here's where you make sergeant," highlights the ambience of the search.

notation, 43 A. L. R. 3d 385, 398 (1972), quoting from *Wong Sun v. United States*, 371 U. S. 471, 487-88 (1963).

In the instant case, we have already determined that appellants' consent to the search was free of coercion and, therefore, "sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U. S. at 486. See also *Commonwealth v. Bishop*, supra. Therefore, the court properly refused to suppress the evidence seized as a result of the consensual search of appellants' van.

II.

The appellants' second noteworthy allegation of error is based upon a conversation in the patrol car when Troopers Seiler and Geary were transporting appellants to the district justice's office for arraignment. During that time Trooper Seiler asked Trooper Geary, both of whom were in the front seat, if he had seen a recent television program dealing with the smuggling of marijuana into the United States from Mexico. Upon hearing this conversation, Richard, who was sitting with Santos in the back seat, stated: "If you're ever in California and want marijuana, see me." At that point Trooper Geary asked Santos if the marijuana came from Mexico, and Santos answered, "It's not mine." Whereupon Richard immediately admitted: "It's mine." Since both appellants had indicated at the barracks, prior to these statements, that they wished to speak to an attorney, further questioning of appellants was clearly improper.

> In *Miranda v. Arizona*,[4] the Supreme Court stated: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation

4. 384 U. S. 436 (1966).

must cease. At this point he has shown that he intends to exercize his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

While Richard's initial statement that he would sell the troopers marijuana if they were ever in California does not appear to be in response to a question,[5] Trooper Geary clearly turned interrogator when he asked Santos about the origin of the supply of marijuana. Our Supreme Court defined "interrogation" in *Commonwealth v. Simala,* 434 Pa. 219, 227 (1969) to be "any question likely to or expected to elicit a confession." In the instant case, Santos' knowledge of the origin of the marijuana would have constituted circumstantial evidence establishing his part in an illicit joint venture to purchase and transport the contraband for sale on the east coast, and would have been inadmissible in evidence against him since it was elicited after he requested counsel. However, the evidence of Santos' involvement had already been overwhelmingly established by the fact that his vehicle has been used in, and had been prepared for, the illegal transportation. His implicit knowledge of the contents of the luggage made the inference of guilt irresistible. Further, Santos' remark

5. This remark was clearly blurted-out and, therefore, admissible. As the Supreme Court has stated: "If the defendant, without prodding or inducement by the police which amounts to interrogation, spontaneously confesses or blurts out incriminating statements, those statements are admissible." *Commonwealth v. Du Val,* 453 Pa. 205, 220 (1973). See also *Commonwealth v. Simala,* supra; *Commonwealth v. Feldman,* 432 Pa. 428 (1968); *Commonwealth v. Eperjesi,* 423 Pa. 455 (1966).

that the marijuana was not his and, from Santos' point of view, Richard's response that the marijuana was his, demonstrates that Santos' statement was harmless beyond a reasonable doubt. Therefore, with respect to Santos, no reversible error was committed by the court in not suppressing the evidence.

Richard, however, was obviously damaged by the admission: "It's mine." Up to that point, the Commonwealth's case against Richard was not strong. All the Commonwealth could prove was that he was a California resident who was a passenger in a vehicle not owned by him which was laden with marijuana. Although he signed the consent to search, any statements he may have made during the search were not offered into evidence. Nor did his blurted statement concerning his ability to procure marijuana in California so damage his case that we can find his subsequent admission of ownership of the 225 pounds of marijuana to have been harmless beyond a reasonable doubt. Thus, if we determine that the remark, "It's mine," was in response to an illegal inquiry of him, Richard is entitled to a new trial.

In the instant case, until Richard admitted ownership of the marijuana, no questions had been directed at him, only at Santos, against whom the Commonwealth already had overwhelming evidence. The fact that no questions were explicitly directed to Richard, however, cannot and should not be wholly determinative of whether the conversation between Santos and Trooper Geary was likely to produce a response from Richard: "[S]ubtle pressures . . . can be applied to encourage or elicit incriminating statements, and we will look carefully to determine whether *Miranda* rights have been violated." 453 Pa. at 222. *Commonwealth v. Mercier,* 451 Pa. 211 (1973); *Commonwealth v. Hamilton,* 455 Pa. 292 (1971). Therefore, in situations where the police have used third per-

sons as instruments of interrogation, the courts have found *Miranda* violations. See *Commonwealth v. Hamilton,* supra; *Commonwealth v. Bordner,* 432 Pa. 405 (1968); Cf. *Commonwealth v. Mercier,* supra. It is not necessarily direct questioning by the police which raises the problem of compliance with *Miranda,* but "police conduct . . . calculated to, expected to, or likely to, evoke admissions." *Commonwealth v. Simala,* 434 Pa. 219, 225 (1969). In the instant case, however, we find that the facts and circumstances surrounding Richard's admission that he owned the marijuana justified the lower court's conclusion that, with respect to Richard, the troopers' conduct was not likely to evoke such admissions.

The two Pennsylvania cases most like the case at bar which have condemned analogous behavior by police posed far stronger cases for suppression. In *Commonwealth v. Hamilton,* supra, the police confronted the appellant with his alleged accomplice knowing that the latter would accuse the appellant of principal responsibility for the felony-murder with which they were both charged. It was admittedly the intent of the investigating officers to thereby provoke the appellant to respond, most likely to his own detriment. However, at no time had they provided appellant therein with his *Miranda* warnings. In condemning this technique of indirect interrogation, the Court emphasized the lack of warnings and the clear intent of the police to evoke inculpatory statements.

Similarly, in *Commonwealth v. Bordner,* supra, the police used the parents of the accused, whom they had prompted to ask a variety of questions, in order to get a confession from the accused. After looking at the totality of the circumstances,[6] the Court concluded:

6. This is the applicable standard under *Commonwealth v. Eperjesi,* supra note 5.

> "The circumstances reveal a plan on the part of police authorities to use the [parents] as a police instrumentality in the interrogation of the accused son and the statements made to the [parents] in the context of this factual setting, are as though made to the police themselves."

In the instant case, the circumstances compel no such conclusion of a plan to use Santos as the instrument for procuring a confession from Richard. At all times, the troopers had been careful to respect appellants' constitutional rights. In light of Santos' already overwhelming implication in the crime, and the light-hearted, if not cavalier, attitude of appellants, the trooper's question concerning the origin of the marijuana appears innocuous—certainly, it could not have been expected or calculated to produce Richard's unresponsive admission of ownership.

The situation in the instant case more closely parallels several federal cases wherein one suspect has made an unsolicited response to a question asked of another suspect in his presence. In these situations, "the general view is that such a response is not the product of 'interrogation,' but a 'volunteered' statement." Y. Kamisar, W. La Fave & J. Israel, Modern Criminal Procedure 584 (4th ed. 1974). Thus, the federal courts have held that suspects who respond to questions asked of third persons, prior to receiving *Miranda* warnings and presumably while unaware of their constitutional rights, have not been interrogated, but rather have volunteered those statements. See *Haire v. Sarver,* 437 F. 2d 1262 (8th Cir. 1971) (husband responded to question asked of wife); *Stone v. United States,* 385 F. 2d 713 (10th Cir. 1967) (driver responded to question asked of passenger). The instant case is stronger than the federal cases insofar as the appellants had been apprised of their constitutional rights on several occasions, including

the fact that they need not speak and that anything they said could be used against them.

In light of all the facts and circumstances, we find that Richard's admission of ownership was volunteered and, therefore, properly admitted into evidence against him.

Accordingly, the judgments of sentence are affirmed.

JACOBS, *J.*, concurs in result.

HOFFMAN, *J.*, files a dissenting opinion, at No. 984.

SPAETH, *J.*, files a concurring opinion.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT.

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No. 983 OCTOBER TERM, 1974.

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No. 984 OCTOBER TERM, 1974.

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COMMONWEALTH OF PENNSYLVANIA

v.

PAUL RICHARD a/k/a RICHARD ANTHONY HARRIS AND THEODORE JAMES SANTOS, JR., APPELLANTS

No. 983—APPEAL OF THEODORE JAMES SANTOS, JR.
No. 984—APPEAL OF PAUL RICHARD a/k/a RICHARD ANTHONY HARRIS.

—

APPEAL FROM THE JUDGMENTS OF SENTENCES IMPOSED APRIL 16, 1974, BY THE COURT OF COMMON PLEAS CRIMINAL, OF CUMBERLAND COUNTY AT NO. 252 DECEMBER TERM, 1972.

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CONCURRING OPINION BY SPAETH, *J.*: FILED MARCH 31, 1975.

The difficulty with this case, as I see it, is not in the law but the facts. Judge HOFFMAN's opinion states that "Seiler further warned the appellants that if consent were not given, the troopers would lock the vehicle and swear out a warrant before the district magistrate. Thereafter, the appellants signed a statement of consent prepared by

Geary." However, as Judge CERCONE's opinion notes, "Both troopers disagreed that they had so phrased their advice and explained why they did not—they were aware that representations of the availability of a search warrant could be construed to be coercive and thereby vitiate the consent. The question, therefore, was one of credibility properly left for resolution by the hearing court below."

Plainly, the hearing judge might have found that appellants had not voluntarily consented to a warrantless search. Not only might the judge have believed that the troopers had threatened to lock the vehicle; he might also have placed some emphasis, as Judge HOFFMAN does, on the facts that when approaching the vehicle, the troopers were armed, and used their weapons to keep appellants covered.

Nevertheless, we cannot reverse a hearing judge's findings except for abuse of discretion, *Commonwealth v. Knowles*, 440 Pa. 84, 269 A. 2d 739 (1970), and when the entire record is considered, I think it fair to say there was no such abuse. Accepting the troopers' testimony, it appears that appellants were specifically told they did not have to consent. Further, the troopers took the unusual precaution of obtaining appellants' written consent. And finally, the manner in which appellants conducted themselves manifests a hard-boiled bravado, which, on balance, persuades me that although most persons would have found the circumstances too threatening to permit of voluntary consent, appellants did not.

IN THE
SUPERIOR COURT OF PENNSYLVANIA.

—

No. 984 OCTOBER TERM, 1974.

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COMMONWEALTH OF PENNSYLVANIA

v.

PAUL RICHARD, A/K/A RICHARD ANTHONY HARRIS AND THEODORE JAMES SATOS, JR.

APPEAL OF PAUL RICHARD,
a/k/a RICHARD ANTHONY HARRIS

—

APPEAL FROM THE JUDGMENT OF SENTENCE IMPOSED BY THE COURT OF COMMON PLEAS OF CUMBERLAND COUNTY, TO NO. 252 DECEMBER TERM, 1972, CRIMINAL DIVISION.

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DISSENTING OPINION BY HOFFMAN, *J.*:

FILED MARCH 31, 1975.

The issue before the Court is whether the appellants' consent to a police search vitiated the illegality of the arrest.

On November 16, 1972, appellants, Paul Richard (a/k/a Richard Anthony Harris) and Theodore James Santos, Jr. were travelling east on the Pennsylvania Turnpike. They were riding in a 1966 International Travel All owned by Santos which was registered in California. At about 1:30 p.m. the police broadcast a description of the vehicle and of the appellants and the belief that the vehicle contained a large quantity of marijuana. The

vehicle was spotted by State Trooper Max Seiler, who requested assistance for the purpose of stopping the vehicle. He was joined by Trooper Robert Geary in a separate cruiser. The appellants complied with the Troopers' instructions to pull off the highway. On alighting from their vehicles, Geary armed himself with a 30 caliber carbine and Seiler with a 12 guage pump shotgun. Geary kept the appellants covered while they were ordered to "spread eagle"; Seiler conducted a body search to assure himself that the two suspects were not armed.

Seiler went back to his cruiser to conduct a license and owner's card check on the appellants. Geary read them their "Miranda" warnings from the standard police form. The appellants stated that they understood their rights. After the warnings were given, Geary asked them for written permission to search the International Travel All. Seiler rejoined them after the license check proved negative. Seiler further warned the appellants that if consent were not given, the troopers would lock the vehicle and swear out a warrant before the district magistrate. Thereafter, the appellants signed a statement of consent prepared by Geary.

The search which followed the execution of the consent form revealed over two hundred pounds of marijuana. Following the discovery of the marijuana, the appellants were taken to the State Police Barracks. At the barracks, the appellants signed forms indicating that they wanted to consult with an attorney. Thereafter, on the way to the district magistrate's office, the police officers engaged appellants in what the officers described as an "informal, inquisitive type conversation" that led to an incriminating statement by appellant Richard.

In January of 1973, appellants were indicted on one count of Unlawful Possession with Intent to Deliver a

Schedule I Controlled Substance. Appellants moved to suppress the physical evidence and the statement made by appellant Richard. The motions were denied after a hearing on February 26, 1973. Subsequently, appellants waived a trial by jury and were tried before the court on February 28, 1973. A finding of guilt was handed down on May 21, 1973. In January of 1974, appellants' motions in Arrest of Judgment and for a New Trial were denied. On April 16, 1974, appellant Richard was sentenced to two to five years imprisonment and appellant Santos was sentenced to one to three years imprisonment.

In a recent United States Supreme Court case, Mr. Justice STEWART stated the law governing warrantless searches: "It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . —subject only to a few specifically established and well-delineated exceptions.' [citations omitted]. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. . . . " *Schneckloth v. Bustamonte,* U. S. , , 93 S. Ct. 2041, 2043-44 (1973).

Another exception to the otherwise strict warrant requirement is that a warrantless search may be made incident to a lawful arrest. *Adams v. Williams,* U. S. , 92 S. Ct. 1921 (1972) citing as authority *Brinegar v. United States,* 338 U. S. 160 (1949) and *Carroll v. United States,* 267 U. S. 132 (1925). The arrest must, however, be based on probable cause; absent probable cause to arrest, the arrest is illegal and the evidence seized in the incident search must be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States,* 371 U. S. 471 (1963); *Commonwealth v. Mackie,* Pa. , 320 A. 2d 842 (1974).

In the instant case, the Commonwealth does not contend that the officers had probable cause to stop the vehicle and concedes that the radio alert was based on insufficient probable cause: "The Commonwealth here does not rely on the radio bulletin to establish probable cause as it does not rely on justifying the search as incident to a lawful arrest, but merely asserts that the bulletin justified the initial stopping of the vehicle."

The Commonwealth attempts to justify the warrantless search on the grounds that the appellants freely consented to the search. The Commonwealth suggests that the stop of the appellants' vehicle was legal; that the initial patdown of the appellants was justified, (see *Terry v. Ohio,* 392 U. S. 1 [1968]); that thereafter, a voluntary consent to search the vehicle was made. Inherent in the Commonwealth's argument are at least two assumptions. First, after the patdown but before the consent was granted, the appellants were not under arrest. Second, even if under arrest whether legal or illegal, the appellants could nonetheless effectively consent to the search.

The Commonwealth's argument flies in the face of the recent Pennsylvania Supreme Court decision in *Commonwealth v. Swanger,* Pa. , 300 A. 2d 66 (1973), aff'd on rehearing, 453 Pa. 107, 111, 307 A. 2d 875 (1973): "when a police officer stops a vehicle he has 'seized' the vehicle and its occupants, and thus, protections of the Fourth Amendment must be considered." The police in the present case observed no violation of The Vehicle Code of Pennsylvania,[1] and the Commonwealth presents no argument that there was probable cause for the stop of the vehicle. Hence, the stop of the vehicle without a violation of the Code and without probable cause was an arrest without legal justification. Further, once the police had stopped the appellants and had conducted the initial

1. 1959, April 29, P. L. 58, § 101; 75 P. S. § 101 et seq.

patdown,[2] there is no question that the appellants were under arrest. In fact, the police told appellants that they could either consent to the search or the officers would lock up the vehicle on the side of the road and take the appellants before a district magistrate. That is, the officers themselves made clear that the appellants were being restrained. (Cf. *Henry v. United States,* 361 U. S. 98, 103 (1959): "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this particular case, was complete.") Hence, before probable cause was shown, appellants were under arrest.

Once the appellants were under arrest, the subsequent "consent" was tainted by prior police illegality: the police told appellants that they had a valid basis for the arrest when in fact, they did not; therefore, appellants merely acquiesced in that show of force which they assumed was lawful. They did not voluntarily consent. *Bumper v. North Carolina,* 391 U. S. 543 (1968). In addition, *Wong Sun,* supra, dictates that the statement made by appellant Richard must also be suppressed because it was the fruit of the illegal arrest.

Finally, even if the consent to the search supplied the justification for the search of the vehicle, the appellants did not thereby also consent to the illegal arrest. Assuming a knowing and intelligent waiver of the right to be free from an unreasonable search, the Court cannot infer from that waiver an additional waiver of the right to be free from illegal arrest. Indeed, this Court must be mindful

2. Appellee points to *Adams v. Williams,* 407 U. S. 143 (1972) as controlling. In *Adams,* the police officer had a reasonable suspicion of criminal activity to justify a "Terry" patdown. See *Terry v. Ohio,* supra. The patdown revealed a weapon which justified further search incident to a lawful arrest. In the instant case, the patdown, even if legal, revealed nothing. The subsequent detention of appellants, therefore, was not justified.

that " 'courts [must] indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson v. Zerbst,* 304 U. S. 458, 464 (1938) [footnote omitted].

Therefore, the judgment of sentence should be reversed and a new trial granted.

APPENDIX II.

COM. v. SANTOS and RICHARD, C. P., CRIMINAL No. 252 Dec. Term 1972.

EDGAR B. BAYLEY, JR., ESQUIRE, Assistant District Attorney

RICHARD C. SNELBAKER, ESQUIRE, and

JAMES M. MORAN, ESQUIRE, for Defendants

RE: MOTIONS IN ARREST OF JUDGMENT AND FOR NEW TRIAL
Before SHUGHART, *P. J.*, and WEIDNER, *J.*

WEIDNER, *J.*, January 10, 1974:—

On November 16, 1972, Troopers Max Seiler and Robert Geary of the Pennsylvania State Police stopped a vehicle driven by the defendant Theodore James Santos, Jr. Defendant Paul Richard was a passenger in the vehicle. Acting on information previously received by radio from Pennsylvania State Police Communication Center at Highspire, Pennsylvania, Trooper Seiler believed that the defendants were transporting narcotics. With the assistance of Trooper Geary, Trooper Seiler conducted an investigation which ultimately led to the seizure of a large quantity of marijuana from the tire-well compartment of the vehicle and from certain items of luggage which were located in the vehicle. The defendants were then arrested and a criminal complaint was filed.

A preliminary hearing was held on November 22, 1972, at which the two defendants were charged with unlawful possession with the intent to deliver a controlled substance, to wit, marijuana. A prima facie case was established and the defendants were bound over to the court and subsequently indicted by a grand jury. The defendants filed timely motions to suppress all evidence and hearings on

these motions were held on February 8, 1973. By order of the court on February 26, 1973, defendants' motion to suppress evidence was overruled and dismissed.

The defendants waived a jury trial and were tried before the writer on February 28, 1973. Both defendants were found guilty as charged. The defendants then filed a post-trial motions for new trial and in arrest of judgment, asserting that (1) the Commonwealth's evidence was insufficient as a matter of law to establish defendants' alleged possession of a controlled substance with intent to deliver, (2) this court erred in admitting evidence obtained as a result of an unlawful apprehension, search, and seizure of the defendants and their vehicle; and (3) the statements made while enroute to the district justice's office and at the prison were not admissible. Additionally, defendant Santos contends that the Commonwealth has the burden of proving, beyond a reasonable doubt, that he is not among the class of persons privileged to possess and deliver controlled substances. We will address this contention forthwith.

This argument is apparently premised on an analysis of the statute which the defendant is charged with violating. Defendant is charged with a violation of § 13(a)(30) of the Controlled Substance, Drug, Device and Cosmetic Act of 1972, (hereinafter, "the Act") No. 64, P. L. —, 35 P. S. 780-113(a)30, in that he:

> did unlawfully, knowingly or intentionally possess with the intent to deliver a controlled substance, to wit: marijuana, a Schedule I substance, not then and there being registered or licensed as required by the act of the Assembly of the Commonwealth of Pennsylvania.

Section B(a)(30) of the Act prohibits:

> Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or

> deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State Board . . .

Section 21 of the Act provides:

> In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information or trial. *The burden of proof of such exemption shall be upon the person claiming it* (Emphasis added).

It is abundantly clear from a reading of Section 21 that no burden rested upon Commonwealth to prove that Defendants were not exempt under the act but that it was a matter that should have been raised by the defense.

We will not summarize the evidence presented at trial to determine whether that evidence is sufficient to support the convictions. It must be remembered that the Commonwealth is to be given the benefit of all favorable testimony and all reasonable inferences arising therefrom. *Commonwealth v. Portalatin*, 223 Pa. Superior Ct. 33 (1972).

On November 16, 1972, Trooper Max Seiler of the Pennsylvania State Police received a radio broadcast alert to the effect that a white International Travelall, California registration SZH992, with two white male occupants, had entered the Pennsylvania Turnpike. The alert indicated that the vehicle was carrying a large quantity of marijuana. Trooper Seiler sighted a vehicle fitting this description and with the assistance of Trooper Robert E. Geary, Pennsylvania State Police, stopped it along the highway. A pat-down search of the occupants, held at gun point by Trooper Geary, was conducted by Trooper Seiler. Satisfied that the defendants had no weapons on their persons, both officers

immediately returned the firearms to their vehicles. From the operator licenses and the vehicle registration obtained, the occupants were identified as Paul Richard, the passenger, and Theodore James Santos, Jr., the driver, the defendants in this action.

At this time both defendants were advised of their *Miranda* rights. Defendants then asked the troopers why they had been stopped. In response the troopers explained that they had reasonable cause to believe that the defendants were transporting a large quantity of marijuana. *Miranda* warnings were again given to the defendants. They indicated an unequivocal understanding of these rights.

The troopers then explained to the defendants that they (the police) did not have the right to search the car. They further explained that a search could only be conducted in either one of two ways. The troopers stated that the first way to search the vehicle would be by obtaining a search warrant from a district magistrate. Under this procedure the troopers must swear out a complaint for a search warrant stating probable cause to believe contraband was in the vehicle. The district magistrate would only issue a search warrant if it was determined that the complaint in fact stated sufficient probable cause to believe the marijuana was present in the carry-all van. The troopers stated that the second way to search the vehicle would be with the consent of the defendants. At no time up until this point did the troopers threaten to arrest the defendants, to impound their vehicle, or to obtain a search warrant. In addition, it was further stated that the defendants had an absolute right to refuse to permit the search. Defendants then agreed to allow the police to search the vehicle and signed a form indicating that their consent was freely given.

With the assistance of defendant Santos, the troopers searched the carry-all van. Defendant Santos voluntarily opened several suitcases by working combination locks. This search revealed a large quantity of a substance the troopers believed to be marijuana. Defendants were then arrested, handcuffed and transported to the police barracks.

At the police barracks the troopers again searched the carry-all van, seizing another large quantity of a substance believed to be marijuana. The marijuana had been secreted in the spare tire compartment. The defendants then signed a form indicating that they did not wish to make any further statements and that they wished to see attorneys.

The troopers then transported the defendants to the district magistrate's office to make formal charges. While enroute, Trooper Seiler initiated a conversation with Trooper Geary regarding a program which had appeared on television concerning illegal drug traffic. During the course of their conversation defendant Richard voluntarily stated that the marijuana belonged to him and not to defendant Santos. Subsequently, at the county prison, defendant Santos stated that he was assisting defendant Richard in transporting the marijuana from California to the east for a fee of one thousand dollars.

The seized substances, aggregating approximately 225 pounds, were presented to the police crime laboratory. An analysis conducted there confirmed Troopers Seiler and Geary's suspicions that the substances were marijuana.

I. SUFFICIENCY OF THE EVIDENCE.

In determining whether the Commonwealth's evidence is sufficient to establish possession of a controlled substance with the intent to deliver as to both defendants, it is important to establish the standard of proof necessary

to support a conviction of this nature. Our courts have followed the definition of "possession" as "power of control and intent to control" as set forth in *United States v. Curzio,* 170 F. 2d 354 (3rd Cir. 1948), for cases of both illegal firearms and narcotics. Under this rule it is necessary to prove that the person charged with possession of an illegal object knew the object was in his possession. *Commonwealth v. Armstead,* 452 Pa. 49 (1973).

It was acknowledged by this court in *Commonwealth v. Jackson and Garrett,* 24 Cumb. L. Jrl. 59, 285 Sept. Term, 1972, that the difficulty with the Pennsylvania rule is that there is an apparent lack of any judicial definition of "power to control" or "intent to control" regarding narcotics possession. After a discussion of the viable alternatives, it was concluded that a broader definition, which would construe these terms to mean merely the ability to exert an influence over the object as opposed to the ability to reduce the object to actual physical control, was the proper guideline for the determination of narcotics possession. Accordingly, we must view the instant case in light of this analysis.

The search of the car in which defendant Santos, the owner, was driving and defendant Richard was a passenger revealed approximately 225 pounds of marijuana. The marijuana was secreted in several suitcases owned by defendant Santos and located in the rear section of the carry-all van and in the spare tire compartment which was also located in this rear section. The factual situation presented here is similar to that found in *Commonwealth v. Jackson and Garrett, supra.* In that case a search of the vehicle in which the defendants were riding, one as the driver and the other as a passenger, produced approximately 15 pounds of heroin. The vehicle involved was a sedan-type and the narcotics were located in the trunk. Access to the trunk was gained through the rear seat, as

the defendants claimed the car was borrowed and they did not know the whereabouts of the trunk-key. In applying the above-mentioned interpretation of the possession rule, the court held that the defendants knew that the narcotics were present and that they intended to transport them. It is interesting to note that there was no conclusive showing that either of the defendants actually owned area inaccessible to the defendants, were in a position where the defendants inaccessible to the defendants, were in a position where the defendants could readily have exerted an influence over them. In addition, the lack of any physical barrier in the vehicle between the defendants and the marijuana indicates an ability to reduce the contraband to actual physical control. This conclusion is illustrated by the relative ease with which defendant Santos removed the suitcases containing the marijuana from the rear section of the carry-all van. In light of the decision in *Commonwealth v. Jackson and Garrett, supra,* we are compelled to hold that the defendants, in the case at bar, knowingly intended to transport the narcotics.

The conclusion that the instant case involves more than the mere presence of the defendants in a vehicle carrying contraband is also highlighted by the facts of the case. The vehicle in question, the carry-all van, belonged to defendant Santos. Defendant Santos took an active part in revealing the presence of the marijuana to Troopers Seiler and Geary. In particular, he opened several suitcases containing narcotics by working combination locks. Defendant Santos also stated that these items of luggage belonged to him. In addition, defendant Santos stated that defendant Richard had offered to pay him one thousand dollars to transport the marijuana and that he had agreed. Defendant Richard, on the other hand, admitted that the marijuana belonged to him in an unsolicited comment to Trooper Geary.

In *Commonwealth v. Jackson and Garrett, supra,* the court also discussed the issue of intent to deliver a controlled substance and concluded that "(t)he very great amount of the drug supports a conclusion that it was intended for sale and not for personal use." Because of the exceptionally large amount of marijuana that was revealed as a result of the search of the vehicle in the instant case, we are likewise compelled to hold that the narcotics were intended for sale and not for personal consumption.

It is the view of this court that the evidence in this case is of ample quantity and quality to justify a finding of guilt beyond a reasonable doubt as to both defendants. Accordingly, defendants' motion in arrest of judgment is denied.

II. ADMISSION OF EVIDENCE OBTAINED AS A RESULT OF THE APPREHENSION, SEARCH, AND SEIZURE OF THE DEFENDANTS AND THEIR VEHICLE.

Defendants contend that this court erred in admitting evidence obtained as a result of an unlawful apprehension, search, and seizure of the defendants in the automobile driven by defendant Santos. On determining the validity of this contention, we must examine the entire chain of events that transpired between the troopers and the defendants.

The first question is whether the defendants' vehicle was lawfully forced to a stop by the troopers. The recent case of *Commonwealth v. Swanger,* 453 Pa. 107 (1973), holds in effect that if a police officer stops a vehicle and restrains the freedom of the operator to leave, he has seized the vehicle unlawfully unless the police can point to specific and articulable facts which would reasonably have led them to believe a crime was being committed. This

decision has rendered illegal the former police practice of spot-checking single vehicles on our highways.

Police are however, permitted to legally stop a person and question him while conducting an investigation; but the police may not restrain the individual or search his clothing unless they have probable cause to arrest that person or have observed conduct otherwise justifying a stop and frisk. *Commonwealth v. Berrios,* 437 Pa. 338 (1970); *Commonwealth v. Hicks,* 434 Pa. 153 (1969). Therefore, in the present case the troopers were acting lawfully when they stopped the defendants' vehicle to conduct an investigation of the information they had received over the police radio.

Moreover, the cases of *Commonwealth v. Berrios, supra,* and *Commonwealth v. Hicks, supra,* were decided under the standards set forth in *Terry v. Ohio,* 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The United States Supreme Court has recently clarified the law in regard to investigatory stops in *Adams v. Williams,* 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972), where the court stated at 407 U. S. 143, 145:

> In *Terry* this Court recognized that a "police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest." (Citations omitted). The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an immediate response. . . . A brief stop of a suspicious individual in order to maintain the

> status quo momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time. (Citations omitted).

In the *Adams* case the police officer stopped the suspect in response to a tip from a reliable informant that the suspect was armed and possessed narcotics. The Supreme Court held that under the circumstances the detention and search of the suspect was lawful and allowed the fruits of that search to be admitted as evidence. In the instant case Trooper Seiler received his information from police headquarters, which we consider to be as reliable as information received from an informant. Trooper Seiler would have been derelict in his duty had he not stopped the vehicle, at least for the purpose of "maintaining the status quo momentarily" in order to obtain more information either from police headquarters or from the defendants to enable him to obtain probable cause to arrest the suspects. This situation is distinguishable from *Swanger, supra,* where the defendant's vehicle was stopped routinely, and not in the course of an investigation; and where the burglar tools were seized during the illegal "search" of the defendant's driver's license and vehicle registration.

In the present case, however, the police frisked the defendants at gun point and conducted a search of their driver's licenses and vehicle registration. Under the standards set forth in *Hicks and Berrios,* the search of the driver's licenses and vehicle registration was unlawful. Neither of these searches, however, produced any information which in any conceivable way led to the subsequent seizure of the marijuana. Thus if the subsequent search of the vehicle was legal and not based upon information obtained in the illegal seizure of the defendants' persons the evidence would be admissible. *Commonwealth v. Nicholls,* 207 Pa. Super. Ct. 410 (1966).

Yet, there is another problem. The Pennsylvania Supreme Court stated in *Commonwealth v. Bosurgi*, 411 Pa. 56, 68 (1963) that

> (a)rrest may be accomplished by "any act that indicates an intention to take (a person) into custody and that subjects him to the actual control and will of the person making the arrest." 5 Am. Jr. 2d Arrest, § 1, p. 695.

The Court later refined this concept by stating that custody occurs when the suspect, as a reasonable person, believes that his freedom of action or movement is restricted by an interrogation. *Commonwealth v. Marabel*, 445 Pa. 435, 441-442 (1971). There can be no doubt that the two suspects in this case were under arrest when the troopers frisked them. Our courts have held repeatedly, however, that a confession made subsequent to an illegal custodial interrogation might still be admissible if lawfully obtained "by means sufficiently distinguishable to be purged of the primary taint." *Commonwealth v. Fogan*, 449 Pa. 552 (1972). In that case a suspect was illegally interrogated and then kept illegally at the police station. While the suspect was at the station other information was revealed which incriminated him, and he was again questioned, this time properly. The confession made by the defendant was held admissible. We see no reason why the same rule should not apply to consensual searches. See generally *Commonwealth v. Burgos*, 223 Pa. Super. Ct. 325, 332 (1972). If the suspect is illegally arrested, then he presumably could not lawfully consent to a search of his person or property. However, the fact that an illegal arrest or search has been made should not vitiate a subsequent consensual search which is lawfully conducted if the totality of the circumstances demonstrates that the original taint has dissipated. See *Commonwealth v. Fogan, supra.*

Where a warrantless search is made pursuant to a consent, the consent must be shown to have been given unequivocally, specifically, freely, and intelligently. *Commonweath v. Mamon,* 449 Pa. 249, 255 (1972). To sustain a consent, the entire set of surrounding circumstances must be examined, and a total absence of coercion, either express or implied, must be shown. *Commonwealth v. Mamon, supra; Commonwealth v. Harris,* 429 Pa. 215, 221 (1968).

In determining whether a consent was voluntary, the court must look to the entire set of surrounding circumstances, including what was said and done by the parties present, and the consenting party's age, intelligence, and educational background. *Commonwealth v. Burgos,* 223 Pa. Super. Ct. 325, 331 (1972). Accordingly, it is argued that defendants' consent was not voluntary because (1) the defendants were removed from their vehicle and frisked at gunpoint, and (2) the defendants were told that the reasonable cause necessary to obtain a search warrant was already possessed by the officers. The argument, however, is without merit, for it is oblivious to the holding of the Pennsylvania Superior Court in *Commonwealth v. Burgos, supra,* where it is clear that coercion depends not only upon what was done by the troopers, but also upon the effect the troopers' actions had upon the consenting party.

The troopers here returned their firearms to their police cruisers once they were unarmed. Subsequently, the troopers twice administered the *Miranda* warnings and asked the defendants if they understood them. Likewise, it was explained to the defendants several times that the consent form need not be signed.

It is also significant that before the defendants would indicate that they understood their *Miranda* rights, they demanded to know why they had been stopped. While such a demand was reasonable, it also preponderates

against a conclusion that the defendants were submissive to the troopers' suggestions. To the same effect is the defendants' willingness to sign the consent form—a willingness which was not to be deterred by repeated warnings that the form need not be signed—and their actual signature of that form. Although it is argued that consent to the inevitable cannot be free of coercion, *Bumper v. North Carolina*, 391 U. S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968), it is clear that the instant case is within the distinction to that rule, that irrespective of apparent inevitability, a consent can be voluntarily given if there is evidence of knowledge that a right is surrendered, of which the consenting party is fully apprised. *Commonwealth v. Marmon*, 449 Pa. 249, 254 (1972). Finally, it should also be noted that defendant Santos actively assisted in the search of the vehicle. Affirmative assistance in a warrantless search implies a consent voluntarily given. *United States ex rel. Anderson v. Rupple*, 274 F. Supp. 364, 371 (E. D. Pa. 1967); aff. 393 F. 2d 635 (3d Cir. 1968).

The entire sequence of events clearly demonstrates that the defendants were fully informed of their rights to require a search warrant, and at liberty to exercise their right without interference. This court holds that the consent was freely and intelligently given, and is, therefore, valid. The defendant Santos even told the trooper that after this search he would make sergeant.

III. STATEMENTS MADE WHILE ENROUTE TO THE DISTRICT MAGISTRATE'S OFFICE AND AT THE PRISON.

It is further argued that the statements made by defendant Richard that the marijuana belonged to him, and by defendant Santos, that defendant Richard had hired

him to transport the marijuana, were lawfully elicited after defendants had indicated that they wished to remain silent and to have the assistance of counsel. A careful examination of the transcripts from the trial and suppression hearing discloses, however, that defendants were informed of their *Miranda* rights and indicated an unequivocal understanding of them. Moreover, there is nothing to suggest that the defendants were plagued by any defect of age, intelligence or education. Absent these factors it would be unreasonable to conclude that the defendants did not understand the nature of their utterances. Accordingly, Troopers Geary and Seiler were under no obligation to again administer *Miranda* warnings to the defendants. See *Commonwealth v. Youngblood,* 453 Pa. 225 (1973).

The statements were given voluntarily and intelligently, free from the blemish of compelling influence. They are not unlike the statements made in *Commonwealth v. DuVal,* 453 Pa. 205 (1973) where the defendant blurted out a confession as he underwent routine processing by a prison official subsequent to arraignment. It was there held that the spontaneous confession was admissible even though made after the *Miranda* warnings had been administered and after the defendant had indicated that he did not wish to undergo interrogation. The court reasoned that the questioning associated with routine prison processing was not intended to nor was it likely to elicit a confession. Likewise, in the case at bar defendant Santos' spontaneous statement was made in the course of routine prison processing. It is clear that such statements are admissible in evidence even when made after the defendant indicates that he desires to stand on his *Miranda* rights. *Commonwealth v. DuVal, supra.*

ORDER OF COURT.

AND NOW, January 10, 1974, for the reasons set forth above, the motions in arrest of judgment and for a new trial filed on behalf of Theodore Santos and Paul Richard are overruled and dismissed.

Defendants are ordered and directed to appear for sentence on receipt by the court of a presentence investigation report.

APPENDIX III.

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

—

CIVIL NO. 75-943

—

IN THE MATTER OF THE APPLICATION OF
THEODORE JAMES SANTOS, JR.

v.

EDGAR B. BAYLEY, ASSISTANT DISTRICT ATTORNEY,
CUMBERLAND COUNTY, PA.

—

CIVIL NO. 75-994

—

IN THE MATTER OF THE APPLICATION OF
PAUL RICHARD, A/K/A
RICHARD ANTHONY HARRIS

v.

EDGAR B. BAYLEY, ASSISTANT DISTRICT ATTORNEY,
CUMBERLAND COUNTY, PA.

———

MEMORANDUM AND ORDER.

This case is before the court on petitioners' applications for writs of habeas corpus. Petitioners Theodore James Santos, Jr. and Paul Richard, a/k/a Richard Anthony Harris, were tried together and ultimately convicted of un-

lawful possession with intent to deliver a Schedule I controlled substance; to wit, 225 pounds of marijuana, in violation of Section 13(a)(3) of the Controlled Substance, Drug Device and Cosmetic Act of 1972, No. 64, P. L. —, 35 P. S. 780.113(a)(3), before Judge Weidner in the Court of Common Pleas of Cumberland County, Pennsylvania. They made a timely but unsuccessful motion for suppression of evidence. A finding of guilt was made on May 21, 1973, and Santos was sentenced to a term of imprisonment of not less than one nor more than three years, while Harris was sentenced to imprisonment of two to five years. Petitioners' motions in arrest of judgment and for a new trial were denied, and on appeal the Superior Court of Pennsylvania affirmed the conviction. Allocatur was denied by the Pennsylvania Supreme Court in a per curiam order entered on July 14, 1975. Thereafter, they filed a petition in this court for habeas corpus.

The facts are these: On November 16, 1972, defendant Santos and his companion defendant Richard, were travelling east on the Pennsylvania Turnpike in a 1966 International Travelall van owned by defendant Santos, and registered in the State of California. State Trooper Max Seiler, in a patrol car, sighted the van heading east and followed the vehicle, while awaiting the arrival of assistance, in response to a radio broadcast from the State Police Communications Center at Highspire to the effect that a white International Travelall, California registration SZH 992, with two white male occupants, had entered the Turnpike at Breezewood carrying a large quantity of marijuana at approximately 1:30 P. M. Trooper Robert Geary appeared on the scene, and with one patrol car in front of the van and one patrol car in the rear, the troopers signalled the driver of the van, defendant Santos, to pull over. The troopers then emerged from their patrol cars, armed with a .30 calibre carbine and a .12 guage pump

shotgun, and instructed the occupants of the van to get out and "spreadeagle" against the van. Trooper Seiler conducted a patdown search while Trooper Geary covered the defendants with his carbine. When the patdown search revealed that the defendants were unarmed the troopers returned their weapons to their cars.

While Trooper Seiler conducted a radio check on defendant Santos' vehicle registration and the drivers' licenses of both defendants, Trooper Geary gave the defendants their Miranda warnings and ascertained that they understood their rights. When questioned by the defendants as to why they were stopped, Trooper Geary informed them that the police had reason to believe that they were transporting a large quantity of marijuana. He then asked defendants if they would permit the troopers to search their van, advising them as follows:

> "I want you to keep this in mind, that if you give me permission and if we would find anything in the vehicle it would be used against you. I want you to understand this. . . . You do not have to give me permission to search the vehicle."

When Trooper Seiler returned to the van (there were no irregularities in appellants' registration or licenses), he administered the Miranda warnings a second time and ascertained that they were understood. When asked again by the defendants why they had been stopped, the troopers explained that they had reasonable cause to believe that the defendants were transporting a large quantity of marijuana.

The troopers then explained to the defendants that they (the police) did not have the right to search the car. Trooper Seiler further explained that a search could only be conducted in one of two ways. He stated that the first way to search the vehicle would be by obtaining a search

warrant from a district magistrate; that under this procedure the troopers would be required to swear out a complaint for a search warrant stating probable cause to believe contraband was in the vehicle. It was further stated to the defendants that the district magistrate would only issue a search warrant if he determined that the complaint in fact stated sufficient probable cause to believe the marijuana was present in the Travelall van. Trooper Seiler stated that the second way to search the vehicle would be with the consent of the defendants. At no time up until this point did the troopers threaten to arrest the defendants, to impound their vehicle or to obtain a search warrant. In addition, it was further stated that the defendants had an absolute right to refuse to permit the search. Defendants then agreed to allow the police to search the vehicle and signed a handwritten consent granting the troopers permission to search the van.

With the assistance of defendant Santos, the troopers searched the van. Defendant Santos went to the front seat of the van, removed a box from under the seat, and extracted a set of keys which he used to open the tailgate. The inside of the van contained suitcases, clothing bags, a cooler, a mattress and blankets. When Santos asked, "Where would you like to start?" Trooper Seiler selected one of the suitcases and Santos thereupon unlocked the combination lock on the suitcase and began removing the clothing inside. Trooper Seiler noted that among the piles of clothing there was a tightly rolled newspaper, and upon unrolling it, discovered a quantity of marijuana. Undaunted, Santos asked where the troopers would next like to look, and Seiler selected a second suitcase, whereupon Santos remarked, "Here's where you make sergeant." Santos unlocked the combination lock and opened the suitcase, which was filled with marijuana packaged in large bundles. Defendants were then handcuffed and taken to

the local State Police barracks. A subsequent search revealed other large caches of marijuana, similarly packaged, including 49 kilos concealed in the spare tire compartment. In all, defendants had been transporting more than 225 pounds of the contraband. Thereafter, the defendants signed a form indicating that they did not wish to make any further statements and that they wished to see attorneys.

The defendants were subsequently transported by the troopers to the district magistrate's office where formal charges were made. While enroute, Trooper Seiler initiated a conversation with Trooper Geary, both of whom were in the front seat, regarding a recent television program dealing with the smuggling of marijuana into the United States from Mexico. Upon overhearing this conversation, Richard, who was sitting with Santos in the back seat, stated, "If you're ever in California and want marijuana, see me." At this point Trooper Geary turned to Santos and asked him if the marijuana came from Mexico, to which Santos answered, "It's not mine." Richard volunteered at this time, "It's mine." Trooper Geary thereafter continued the questioning of the petitioners in order to obtain more information. Subsequently, at the county prison, defendant Santos stated that he was assisting defendant Richard in transporting the marijuana from California to the east for a fee of one thousand dollars.

Petitioners have exhausted their state remedies. They are not required to make use of the provisions of the Post Conviction Hearing Act [1] or raise issues again which were determined on direct appeal. Recent cases have consistently held that a state prisoner's thorough exercise of direct appellate remedies is a sufficient exhaustion of state remedies for federal habeas corpus purposes. *United*

1. 1965, Jan. 25, P. L. 1580 § 2, 19 P. S. §§ 1180-1182.

States ex rel. Schultz v. Brierly, 449 F. 2d 1286, 1287 (3rd Cir. 1971); *Osborn v. Russell,* 434 F. 2d 650, 651 (3d Cir. 1970). The Supreme Court made it clear in *Brown v. Allen,* 344 U. S. 443, 447, 97 L. Ed. 469 (1953), that the exhaustion doctrine is not intended to give the states more than one full chance. *See also, United States ex rel. Geisler v. Walters,* 510 F. 2d 887 (3d Cir. 1975).

Petitioners rely on the recent holding of the Supreme Court in the case of *Brown v. Illinois,* — U. S. —, 45 L. Ed. 2d 416 (1975), for their contention that a writ of habeas corpus should be issued discharging petitioners from custody on the grounds that the marijuana in the present case was seized as a result of a search illegal under the Fourth Amendment and was therefore inadmissible under the exclusionary rule announced in *Wong Sun v. United States,* 371 U. S. 471, 9 L. Ed. 2d 441 (1963).

In *Wong Sun* the Supreme Court clarified the nature of the Fourth Amendment protection from unreasonable searches and seizures by extending the scope of the application of the exclusionary rule to verbal statements as well as to the more traditional seizures of tangible "papers and effects." In addition to the exceptions to the exclusionary rule established by the court in *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 64 L. Ed. 319 (1920), and *Nardone v. United States,* 308 U. S. 338, 84 L. Ed. 307 (1939),[2] the *Wong Sun* Court recognized that not all evidence is "fruit of the poisonous tree" simply because it could not have come to light but for the illegal

2. In *Silverthorne* the Supreme Court held that the exclusionary rule has no application where the government learns of the evidence "from an independent source." 308 U. S., at 392. The Supreme Court delineated a second exception to the exclusionary rule in *Nardone v. United States, supra,* for cases in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has "become so attenuated as to dissipate the taint."

actions of the police. Specifically, the Supreme Court held that the application of the exclusionary rule was dependent on " 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint' . . . ." *Wong Sun, supra,* at 455. Accordingly, where a statement is the product of an intervening independent act of a free will and such is "sufficiently an act of free will to purge the primary taint of the unlawful invasion" (*Id.,* at 486); *see, Brown v. Illinois, supra,* at 426, then the statements and other evidence obtained after an illegal arrest or search are admissible as evidence.

In *Brown v. Illinois,* the Supreme Court elaborated on the principle it first announced in *Wong Sun.* The facts of the *Brown* case are briefly as follows. The defendant was arrested outside his apartment without probable cause and without a warrant during an investigation of a murder which had occurred a week earlier. After having been driven to the stationhouse, defendant was taken to the interrogation room, given his *Miranda* warnings and questioned concerning the murder under investigation. Subsequently, defendant made an in-custody inculpatory statement admitting his participation in the murder. After accompanying the police while they located and arrested his accomplice, defendant was again placed in the interrogation room and administered his *Miranda* rights, whereupon he gave a second statement providing a factual account of the murder substantially in accord with his first statement but containing factual inaccuracies with respect to his personal background. The Supreme Court of Illinois recognized the unlawfulness of the defendant's arrest, but held that the giving of *Miranda* warnings *in*

and of themselves served to break the causal connection between the illegal arrest and the giving of any statements, and to vitiate the taint of the illegal arrest, so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible so long as, in the traditional sense, it was voluntary and not coerced in violation of the Fifth and Fourteenth Amendments. The Supreme Court granted certiorari because of its concern about the implication of its holding in *Wong Sun* to the facts of the *Brown* case.

After reviewing the facts and the holding of *Wong Sun*, the Court, in *Brown*, held that *Miranda* warnings, alone and per se, do not ensure that the act is sufficiently a product of free will to break the causal connection between the illegality of the arrest and any subsequent confessions. The *Miranda* warnings are only a procedural safeguard employed to protect *Fifth* Amendment rights, specifically the Fifth Amendment guarantee against coerced self-incrimination, from the compulsion inherent in custodial surroundings. The Court further stated:

> "The exclusionary rule, however, when utilized to effectuate the *Fourth* Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without Miranda warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. . . . (emphasis supplied)
>
> "Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the

> statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be 'sufficiently an act of free will to purge the primary taint.' . . ." 45 L. Ed. 2d, at 426.

For the purpose of determining whether a confession is the product of a free will under *Wong Sun*, the Court held that the voluntariness of the statement is only a threshold requirement. While the *Miranda* warnings are an important factor in determining whether the confession is obtained by exploitation of an illegal arrest, all of the facts of each case must be considered. Other relevant factors include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.

In *Commonwealth v. Bishop*, 425 Pa. 175, 182, 228 A. 2d 661 (1967) the Pennsylvania Supreme Court explained the *Wong Sun* test this way: "[I]f the connection between the arrest and the confession is shown to be so vague or tenuous 'as to dissipate the taint' *or* 'sufficiently an act of free will,' the confession is admissible, despite the illegality of the arrest. By 'sufficiently an act of free will,' we mean that not only was the confession truly voluntary, *but also free* of any element of coerciveness due to the unlawful arrest. . . ." *Id.*, at 183. (emphasis in original) *See also, Bertrand Appeal*, 451 Pa. 381, 389, 303 A. 2d 486 (1973) quoting from *Bishop* with approval. The mere perfunctory recital of *Miranda* warnings is not a sufficient intervening act of free will to break the chain of events leading directly from the illegal arrest to the confession. *Id.*, at 390-91.

The federal circuit court cases similarly have held that the mere showing of the voluntariness of the confession is

insufficient to purge the taint of a prior illegal arrest.[3] The circuit courts have pointed to other factors which are of major significance in determining the relationship between an illegal arrest and a subsequent confession: (a) the proximity of an initial illegal custodial act to the procurement of the confession; [4] (b) the intervention of other circumstances subsequent to an illegal arrest which provides a cause so unrelated to that initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest; [5] (c) the wantonness of the arrest and flagrancy of the official police conduct; [6] and (d) the existence of a significant change in circumstances, such as affording the suspect an effective opportunity to obtain the assistance of counsel.[7]

Clearly, the holdings in the aforementioned cases are not materially different from the reasoning of the Supreme Court in the recent decision of *Brown v. Illinois.* The standard for evaluating the taint of post-illegal arrest verbal evidence was clearly established at the time of the trial of the present case, both in the federal courts and in the local Pennsylvania state courts.

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3. *See, e.g., Collins v. Beto,* 348 F. 2d 823, 828 (5th Cir. 1965); *Commonwealth ex rel. Craig v. Maroney,* 348 F. 2d 22, 29 (3d Cir. 1965).

4. *Commonwealth ex rel. Craig v. Maroney, supra; Commonwealth v. Bishop,* 425 Pa. 175, 183 n. 7, 228 A. 2d 661 (1967). In *Collins v. Beto, supra,* Judge Tuttle recognized the relevance of this factor but also emphasized that the mere passage of time could not serve to dissipate the taint, otherwise ". . . the police would be free simply to keep a suspect 'on ice' for a day or two before beginning an interrogation. . . ." (348 F. 2d, at 828).

5. *Commonwealth ex rel. Craig v. Maroney, supra; Commonwealth v. Bishop, supra.*

6. *Collins v. Beto, supra.* (Concurring opinion, Friendly, J.)

7. *Collins v. Beto, supra.*

The Cumberland County Court found, beyond the mere voluntariness of the consent rendered, sufficient relevant factors to properly render a decision that the consent was free of any element of coerciveness due to the unlawful arrest. The court outlined the standard it adopted, indicating that the illegality of an arrest should not vitiate a subsequent consensual search if the totality of the circumstances shows a total absence of coercion, either express or implied, and that the original taint has dissipated. See, *Commonwealth ex rel. Craig v. Maroney, supra,* and *Commonwealth v. Bishop, supra.*

The Common Pleas Court noted that the troopers twice administered the *Miranda* warnings and ascertained that the defendants understood them. Likewise, it was explained to them several times that the consent form need not be signed. Under the authority of *United States v. Menke,* 468 F. 2d 20 (3d Cir. 1972), this showing is sufficient to establish the voluntariness of the defendants' consent to search. In *Menke,* following the arrest of the defendant and the administration of *Miranda* warnings by the arresting officers, the defendant allegedly volunteered that a parcel of contraband being sought by the enforcement officers was in the trunk of his automobile. Defendant thereafter expressed his willingness to get it if the agent wanted it, explaining that it would be easier for him to get it because the trunk had a tricky lock. The Third Circuit Court reaffirmed its holding in *Government of Virgin Islands v. Berne,* 412 F. 2d 1055 (3d Cir. 1969), *cert. denied,* 396 U. S. 837, *reh. denied,* 396 U. S. 937 (1969), stating that where a defendant is given the detailed *Miranda* warnings, even in the absence of advising the defendant that he was not legally obligated to open the trunk of his automobile in the absence of a search warrant covering the automobile, and thereafter ". . . vol-

untarily submits to interrogation and freely offers information on the existence and location of specifically identified evidence, and further agrees to surrender the evidence to the police, fully cognizant of his right to remain silent and fully aware that the information he provides may be used against him, the seizure of such evidence does not violate the Fourth Amendment. In such a case, the accused, by his words and actions, has abandoned any privacy or security in the location of the evidence. . . ." *Id.*, at 1062; *Menke, supra,* at 24.

The Common Pleas Court, having determined the voluntariness of the consent, continued its discussion of the case with an analysis of further factors pertaining to the nature of the defendants' consent. The court found that, contrary to the contentions of counsel for the defendants, the defendants' consent was not a mere acquiescence to a show of force of the troopers, and we agree. The United States Supreme Court has distinguished the informal and unstructured conditions of consent searches, a part of the standard investigatory techniques of law enforcement agencies, which normally occur on the highway or in a person's home or office, from the coercive atmosphere of custodial or stationhouse interrogation. *Schneckloth v. Bustamonte,* 412 U. S. 218, 232, 36 L. Ed. 2d 854 (1973). The initial brief display of arms by the troopers at the berm of the Pennsylvania Turnpike was not so inherently coercive as to preclude an independent, intervening voluntary consent on the part of the defendants.

Further, while the holdings in *Bumper v. North Carolina,* 391 U. S. 543, 20 L. Ed. 2d 797 (1968) and *United States v. Ricci,* 313 F. Supp. 31 (E. D. Pa. 1970) establish that cooperation of defendants in the face of law enforcement officers possessed with seemingly valid search warrants is not the product of a free will, untainted by the

invalid warrants, these decisions are limited by their facts to searches under color of warrants where presumably probable cause has already been established before an independent judicial officer and the occupant accordingly has no right to resist the search. The facts in the present case rebut any further contention that the troopers conducted the search of the van under color of their office or the law which they personify, without any justification in law for such intrusion.[8] Having explained to the defendants that they (the defendants) were stopped because the troopers had "reasonable cause to believe," or "reason to believe," that their vehicle contained a large amount of marijuana, which in fact was true based on the police bulletin received over the radio, the troopers further explained that they (the police) did not have the right to search the van unless they procured a search warrant from a district magistrate based on sufficient probable cause, or unless the defendants consented to such a search. Clearly, where a person has been warned of his right to refuse the search in addition to his *Miranda* rights, it is inconceivable that his election to consent to the search and deliver the evidence up to the police was anything less than a free and voluntary abandonment of his security in this otherwise constitutionally protected area. *Menke v. United States, supra,* at 25. As the Common Pleas Court noted, "Although it is argued that consent to the inevitable cannot be free of coercion (citation omitted), it is clear that the instant case is within the distinction to that rule, that irrespective of apparent inevitability, a consent can be voluntarily given if there is evidence of knowledge that a right is surrendered, of which the consenting party is fully apprised. *Commonwealth v. Mamon,* 449 Pa. 249, 254 (1972)."

8. *See, e.g., Amos v. United States,* 255 U. S. 313, 65 L. Ed. 654 (1921); *Johnson v. United States,* 333 U. S. 10, 92 L. Ed. 436 (1948).

The Supreme Court concluded, in *Schneckloth v. Bustamonte, supra,* at 235-46, that a consensual search does not entail a waiver since it is in no way involved in protection of the ascertainment of truth or of the fairness of a criminal trial. As a consequence the government is not required to demonstrate a knowing or intelligent waiver, or an intentional relinquishment or abandonment of a known right or privilege, nor is the court required to indulge in every reasonable presumption against waiver of fundamental constitutional rights. *See, Johnson v. Zerbst,* 304 U. S. 458, 464, 82 L. Ed. 1461 (1938).

The Common Pleas Court's decision also dismissed any allegation that the actions of the troopers constituted flagrant official police misconduct. In finding that the entire sequence of events demonstrated that the defendants were fully informed of their right to require a search warrant, and at liberty to exercise that right without interference, the court noted (1) that the defendants demanded to know why they had been stopped before they would acknowledge their *Miranda* rights, and (2) that both defendants willingly signed the consent form even after repeated warnings that they could refuse to sign. The court concluded that this conduct militated against a conclusion that the defendants were submissive to the troopers' suggestions or "show of force." The court further noted that defendant Santos actively assisted in the search of the vehicle; such affirmative assistance in a warrantless search also implies a consent voluntarily given. *Menke v. United States, supra; United States ex rel. Anderson v. Rundle,* 274 F. Supp. 364, 371 (E. D. Pa. 1967), *aff'd,* 393 F. 2d 635 (3d Cir. 1968). Here, too, we agree with the Court of Common Pleas.

Counsel for the defendants contend that the consent was tainted by the prior wanton and illegal arrest; that the

police told the defendants they had reasonable cause for the arrest, when, in fact, they did not. While the arrest of the defendants at the time that the troopers frisked them was not based on valid probable cause and was therefore illegal, the stopping of the van and the subsequent search were justified under the circumstances and did not amount to flagrant or wanton misconduct. Upon a review of the holdings in *Terry v. Ohio,* 392 U. S. 1, 20 L. Ed. 2d 889 (1968) and *Adams v. Williams,* 407 U. S. 142, 32 L. Ed. 2d 612 (1972), the Common Pleas Court properly held that the troopers were acting lawfully when they stopped the defendants' vehicle to conduct an investigation of the information they had received over the police radio. As was stated by the Supreme Court in *Adams:*

> "In Terry this Court recognized that a 'police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.' The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an immediate response . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (citations omitted) 32 L. Ed., at 616-17.

The troopers maintained that they had "reasonable cause to believe" that there was a large quantity of marijuana in

the van as justification for stopping the vehicle. This was in fact the case. The troopers could reasonably have believed that there was marijuana being transported in the van on the basis of the information received over the radio. At no time did the officers claim that they had probable cause to either arrest the defendants or to search the van. Nor do the Supreme Court cases establishing the rights of defendants mandate an extended explanation on what constitutes probable cause to search, or on the difference between "reasonable cause to believe" an investigatory stop is warranted, and "probable cause" to search.

The subsequent search of the van conducted by the troopers was certainly not gross misconduct, irrespective of the defendants' consent to search. Recent Supreme Court opinions have clearly recognized a necessary difference between circumstances justifying a warrantless search of an automobile and a home or office. *Chambers v. Maroney,* 399 U. S. 42, 26 L. Ed. 2d 419 (1975); *Carroll v. United States,* 267 U. S. 132, 69 L. Ed. 543 (1925). Warrantless searches and seizures of contraband goods are more liberally allowed under the Fourth Amendment where they are in the course of transportation, and easily removed from the jurisdiction or destroyed. Such a seizure is legal if the seizing officer has reasonable or probable cause for believing that the vehicle which he stops and seizes has contraband therein which is being illegally transported. *Id.,* at 156. The search of an automobile on probable cause proceeds on a theory wholly different from that justifying the search incident to an arrest; the right to search and the validity of the seizure are not dependent on the right to arrest, but rather they are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. *Chambers, supra,* at 49. Acting upon an unsubstantiated police bulletin received over the radio, the troopers could

reasonably have believed the issuer of such information had sufficient probable cause to justify their stopping and searching the van immediately before it could be removed from the locality. In truth, the dispatcher may not have had valid probable cause to warrant the arrest of the defendants, or perhaps even the search of the van, but that in no way renders such arrest and search flagrant or wanton. And the Supreme Court has held that it sees no difference, for constitutional purposes, "between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers*, at 52. Even without actual probable cause to search, either procedure is reasonable if at the time of the search the police could reasonably have presumed the dispatcher to have sufficient probable cause to search the fleeting target.

The Common Pleas Court observed that coercion depends not only upon what was done by the troopers, but also upon the effect the troopers' actions had upon the consenting party. By reason of the fact that the defendants demanded to know why they had been stopped before they would acknowledge the *Miranda* warnings, and in light of their conduct during the search itself, it appears that not only is any contention of submission or acquiescence to flagrant official conduct dispelled, but also that such conduct on the part of the petitioners constitutes an intervening cause for consent so unrelated to the initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest. As Judge Spaeth concluded in his concurring opinion to the decision of the Superior Court of Pennsylvania affirming the Court of Common Pleas:

> "Accepting the troopers' testimony, it appears that appellants were specifically told they did not have to consent. Further, the troopers took the unusual precaution of obtaining appellants' written consent. And finally, the manner in which appellants conducted themselves manifests a hardboiled bravado, which, on balance, persuades me that although most persons would have found the circumstances too threatening to permit of voluntary consent, appellants did not." *Commonwealth v. Richard and Santos,* 983-984 October Term 1974.

Therefore, we conclude that the conduct of the troopers during the stopping of the defendants and the search of the van was not wanton or flagrant. We further find that a voluntary and uncoerced act of consent intervened between the illegality of the arrest and the subsequent consent, and thereby dissipated any taint.

The defendants emphasize the temporal proximity of the initial illegal arrest to the procurement of the consent, pointing out that the consent to search was obtained within the space of nine or ten minutes. While the temporal proximity is admittedly a factor which should be considered, and in fact was not expressly considered in the opinions rendered by the Superior Court of Pennsylvania or the Common Pleas Court, we conclude that other factors preponderate to indicate the intervention of a voluntary act of consent within that short lapse of time. In recognizing the relevance of this factor, Judge Tuttle, in his opinion in *Collins v. Beto,* 348 F. 2d 823, 828 (5th Cir. 1965), qualified the weight to be accorded to it by also emphasizing that the mere passage of time could not serve to dissipate the taint, otherwise ". . . the police would be free simply to keep a suspect 'on ice' for a day or two before beginning an interrogation. . . ."

We also reject the contention proffered by counsel for defendant Richard that the written consent obtained from Richard was vitiated by fraudulent misrepresentations on the part of the troopers. Specifically, counsel contends the signing was the result of a representation by the troopers to the effect that the purpose of signing the paper was to "release" the officers from any possible consequences of the search. Trooper Geary's precise testimony, however, was that the police would not search the vehicle based on defendants' oral consent alone, but rather they would require written permission to protect the troopers from any recourse if something would be stolen or anything of that nature. Thereafter, the defendants were again cautioned that they did not have to give the troopers permission to search the van. The written permission slip which was signed by both defendants further indicates the clear consent purpose of the signing: "I give my permission to Trp. Robert C. Geary and Tpr. Max Seiler to search my veh. . . ." We find that Richard's consent was clear and unequivocal, and not induced by any misrepresentations on the part of the troopers.

The final contention of counsel for defendant Richard is that his (Richard's) statement, "It's mine," spoken while enroute to the district magistrate's office for arraignment, should have been excluded from the testimony pursuant to a written agreement with the court to exclude such statements.[9] The record is devoid of any such agreement or

9. Counsel also argues that testimony of the troopers establishing that the incriminating statement was made by defendant Richard at that time materially changed between the suppression hearing and the trial. Trooper Geary specifically attributed the statement, "It's mine," to defendant Richard at both the suppression hearing and the trial. Whereas, Trooper Seiler indicated at the suppression hearing that the statement was made by "someone in the back seat;" it appears that his more specific testimony at the trial may have been prompted or recalled by Trooper Geary's prior testimony at the suppression hearing.

statement, and as a consequence there is no basis by which to determine the content or terms of such agreement. Further, the record indicates that the statement, "It's mine," was not in response to any questioning by the troopers. A question had been directed to defendant Santos by Trooper Geary concerning the source of the marijuana and defendant Richard's statement was a spontaneously volunteered admission following Santos' denial of ownership. Under the circumstances, this does not appear to be a situation where the police conduct was "expected to, or likely to, evoke admissions." *Commonwealth v. Simala,* 434 Pa. 219, 226, 352 A. 2d 575 (1969). What followed did, however, constitute improper questioning in light of the signed waiver forms which had been crossed out in part so as to indicate that the defendants were not willing to answer questions and desired to speak with an attorney first. As Trooper Geary testified, he undertook "informal, inquisitive type questioning" in order to obtain further information following defendant Richard's apparent openness to talk. Therefore, subsequent responses by the defendants to questions asked by the troopers were properly excluded as the product of improper custodial interrogation.

Accordingly, an appropriate order will be entered.

R. Dixon Herman,
R. Dixon Herman,
United States District Judge.

Dated: September 16th, 1975.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

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CIVIL NO. 75-943.

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CIVIL NO. 75-994.

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IN THE MATTER OF THE APPLICATION OF
THEODORE JAMES SANTOS, JR.

v.

EDGAR B. BAYLEY, ASSISTANT DISTRICT ATTORNEY,
CUMBERLAND COUNTY, PA.

—

IN THE MATTER OF THE APPLICATION OF
PAUL RICHARD, A/K/A
RICHARD ANTHONY HARRIS

v.

EDGAR B. BAYLEY, ASSISTANT DISTRICT ATTORNEY,
CUMBERLAND COUNTY, PA.

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ORDER.

AND NOW, this 16th day of September 1975, IT IS ORDERED that for the reasons set down in the memorandum filed this date, the applications of Theodore James Santos, Jr. and Paul Richard, a/k/a Richard Anthony Harris, for writs of habeas corpus be and are hereby denied.

R. DIXON HERMAN,
R. Dixon Herman,
United States District Judge.

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QUESTION PRESENTED

Does the case of *Brown v. Illinois* require Supreme Court review, where the holdings in the Courts below are clearly consistent with the rule and rationale of the *Brown* decision?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF FACTS

The facts of this case are as set forth in the opinion by the Superior Court of Pennsylvania, as follows:

"On November 16, 1972, State Trooper Max Seiler received a radio broadcast to the effect that a white International Travelall, California registration SZH992, with two white male occupants, had entered the Turnpike at Breezewood carrying a large quantity of marijuana. Trooper Seiler, who was in the vicinity, responded to the call and soon sighted the vehicle heading east. After calling for assistance, Trooper Seiler followed the van until Trooper Thomas Geary appeared on the scene. With one patrol car in the rear, the troopers signalled the driver of the van, appellant Santos, to pull over. Each trooper emerged from his car armed, and instructed the occupants of the van to get out and "spreadeagle" against the van. After the "patdown" proved that the appellants were unarmed, the troopers returned their weapons to their cars.

"While Trooper Seiler radioed that the appellants had been apprehended, and waited for information concerning the status of the vehicle registration and appellants' drivers' licenses, Trooper Geary gave the appellants their *Miranda* warnings and ascertained that they understood them. He then informed them that the police had reason to believe that they were transporting a large quantity of marijuana, and asked appellants if they would permit the troopers to search their van, advising them as follows:

'I want you to keep this in mind, that if you give me permission and if we would find anything in the vehicle it would be used against you – I want you to understand this . . . . . You do not have to give me permission to search the vehicle.'

"When Trooper Seiler returned to the van (there were no irregularities in appellants' registration or licenses), he also gave appellants their *Miranda* warnings and ascertained that they understood them.

"He then advised appellants that in Pennsylvania they were not required to consent to the search and could demand that the police produce a warrant. Despite those warnings, Santos and Richard orally consented to the search. Troopers Seiler and Geary, however, were reluctant to search unless appellants consented in writing. Both Santos and Richard then signed a handwritten consent granting the troopers permission to search the van. Appellant Santos then went to the front seat of the van, removed a box from under the seat, and extracted a set of keys which he used to open the tailgate.

"There was nothing suspicious about the inside of the van – it contained suitcases, clothing bags, a cooler, a mattress and blankets. Santos then said, 'where would you like to start;' and, Trooper Seiler selected one of the suitcases. Santos thereupon opened the combination lock on the suitcase and began removing the clothing inside. Trooper Seiler noticed that among the piles of clothing there was a tightly rolled newspaper, and upon unrolling the newspaper, discovered a quantity of marijuana. Undaunted, Santos asked where the troopers would next like to look, and Seiler selected a second suitcase, whereupon Santos remarked, "Here's where

you make sergeant!" Santos undid the combination lock and opened the suitcase which was filled with marijuana packaged in large bundles. Appellants were then handcuffed and taken to the local State Police barracks. A subsequent search revealed other large caches of marijuana, similarly packaged, including 49 kilos concealed in a compartment cut out of the floor of the van and recovered with the plywood flooring. In all, appellants had been transporting more than 225 pounds of the contraband.

"At the suppression hearing appellant Santos corroborated the troopers' testimony that they had advised appellants of their rights, including their right to refuse to consent. Santos alleged, however, that the troopers had stated that if appellants did not consent, they would impound the van and get a search warrant. Both troopers disagreed that they had so phrased their advice and explained why they did not — they were aware that representations of the availability of a search warrant could be construed to be coercive and thereby vitiate the consent. The question, therefore, was one of credibility properly left for resolution by the hearing court below.

"Additionally, the Court noted that Troopers Seiler and Geary transported appellants to the District Justice's office for arraignment, . . . during that time Trooper Seiler asked Trooper Geary, both of whom were in the front seat, if he had seen a recent television program dealing with the smuggling of marijuana into the United States from Mexico. Upon hearing this conversation, Richard, who was sitting with Santos in the back seat, stated: 'If you're ever in California and want marijuana, see me.' At that point Trooper Geary asked Santos if the marijuana came from Mexico, and Santos answered, 'It's not mine.' Whereupon Richard immediately admitted: 'It's mine.' "

ARGUMENT OPPOSING THE WRIT

THE DECISIONS BELOW ARE CLEARLY CONSISTENT WITH THE RULING AND RATIONALE OF *BROWN V. ILLINOIS*, THEREFORE NEGATING ANY NEED FOR SUPREME COURT REVIEW.

Petitioner alleges that the courts below failed to apply the recent decision of *Brown v. Illinois*, No. 73-6650 (June 26, 1975), and that such failure mandates review by this Court. Respondent submits that proper consideration was given to the *Brown* decision, abrogating the need for further reconsideration on the present factual situation by the United States Supreme Court.

In requesting review of the Pennsylvania Superior Court decision by the Pennsylvania Supreme Court, petitioners specifically called attention to the pending *Brown* case, not decided at that time. That Court denied allocatur on July 14, 1975, over two weeks *after* the *Brown* decision was handed down. The decision was therefore available to the Supreme Court of Pennsylvania before it declined to hear petitioners' appeal. Furthermore, the *Brown* case is not inconsistent with the cases of *In Re: Betrand*, 451 Pa. 381 (1973) and *Commonwealth v. Bishop*, 425 Pa. 175 (1967), wherein the Supreme Court of Pennsylvania has held that *Miranda*[1] warnings, without more, do not purge the taint of an illegal arrest.

On collateral attack in United States District Court, petitioners again specifically raised the applicability of the *Brown* decision. The decision of the United States District

Court considered *Brown* and concluded that *Brown* did not warrant a reversal of the convictions of Santos and Harris.

Therefore, the *Brown* case was considered by the lower Courts. The mere fact that lower courts held *Brown* was not applicable to reverse on the instant facts is not an issue of constitutional magnitude necessitating further review.

It is submitted that petitioners misconceive the scope of *Brown*. *Brown* deals with a Fifth Amendment question, involving voluntariness of a confession, while the instant cases deal with the voluntariness of a search which is a Fourth Amendment issue. *Brown* does not abolish the case-by-case nature of any consideration of voluntariness. While holding that the mere giving of *Miranda* warnings, without more, will not dissipate the taint of an illegal arrest, the *Brown* decision does not hold that such taint can in no circumstances be removed.

As noted in *Brown:*

> "The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, see *Johnson v. Louisiana,* 406 U.S. 356, 365 (1972), and particularly, the purpose and flagrancy of the official misconduct are all relevant. See *Wong Sun v. United States,* 371 U.S. at 491."

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[1] *Miranda v. Arizona,* 384 U.S. 436 (1966)

Argument

The present fact situation has much more than mere perfunctory giving of *Miranda* warnings. Here, *Miranda* warnings were given on at least two occasions, and petitioners were specifically told they had an absolute right to refuse to allow the search.

In his concurrence in the Pennsylvania Superior Court's opinion, Judge Spaeth pointed out:

> ". . . appellants were specifically told they did not have to consent. Further, the troopers took the unusual precaution of obtaining appellants' written consent."

The conduct of the officers went far beyond mere recitation of *Miranda* warnings. Petitioners here were informed of their rights under both the Fourth and Fifth Amendments; whereas, *Brown* involves only the giving of the latter. Thus, even if the initial stop was improper, the rule petitioners glean from the *Brown* decision does not demand suppression, as that rule deals with *Miranda* warnings as the *only* dissipating factor.

That any taint was in fact dissipated is manifested by petitioners' conduct during the search itself. The petitioners' attitude was variously described as "light-hearted, if not cavalier" (J. Cercone for the Superior Court majority) and "hard-boiled bravado" (J. Spaeth, concurring with the Superior Court majority). The entire record reflects through petitioners' words and conduct that petitioners were not coerced, but rather were acting voluntarily throughout the entire incident.

Petitioners further allege that no basis was ever established for the stop of their vehicle, that the show of force was unwarranted, and that the officers used fraud in obtaining consent to search. Petitioners' allegations are said to comprise flagrant police misconduct.

Argument

Respondent submits that (1) the stop and detention was proper, based on the radio bulletin the officers received, (2) that the temporary drawing of weapons was reasonable since the troopers knew only that the occupants were suspected of interstate transportation of large amounts of contraband, and (3) that no fraud was used at any point in the episode.

The United States District Court utilized the rationale of *Terry v. Ohio*, 392 U. S. 1, 20 L. Ed. 2d 889 (1968), and *Adams v. Williams*, 407 U.S. 142, 32 L. Ed. 2d 612 (1972), and found the stop reasonable, stating:

> "While the arrest was not based on valid probable cause and was therefore illegal, the stopping of the van and the subsequent search were justified under the circumstances and did not amount to flagrant or wanton misconduct."

This conclusion is bolstered by the rationale underlying *Whiteley v. Warden*, 401 U.S. 560 (1971), where a stop, as here, was held reasonable based solely on receipt of a police radio bulletin. Since the seizure of contraband in the present case was thereafter based on a consent search, the Commonwealth does not have to establish independent probable cause to justify the seizure. This case represents exactly the type of fact situation wherein a consent search was utilized to ferret out contraband which would have otherwise gone undetected. Such strategy had been encouraged by your Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The United States District Court summarized the issue of coercion and misconduct as follows:

> "By reason of the fact that the defendants demanded to know why they had been stopped before they would

acknowledge the *Miranda* warnings, and in light of their conduct during the search itself, it appears that not only is any contention of submission or acquiescence to flagrant official conduct dispelled, but also that such conduct on the part of the petitioners constitutes an intervening cause for consent so unrelated to the initial illegality that the acquired evidence may not reasonably be said to have been directly derived from, and thereby tainted by, that illegal arrest."

The factual determination by the Courts below was therefore justified by the evidence and the record, based on the *Brown* decision and related cases. Since review of cases such as this one must be made on a factual, case-by-case basis, there is no constitutional issue of sufficient magnitude to warrant the granting of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Edgar B. Bayley
First Assistant District Attorney
Attorney for Respondent